Supreme Court, U.S.
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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

ROSA COVINGTON PACKARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
JAMES H. FELDMAN, JR.
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., is the government's asserted inability to further its compelling interest by any means less restrictive of the plaintiff's religious liberty an affirmative defense to be pleaded under Fed.R.Civ.P. 8(c), or may a court grant a Rule 12(b)(6) motion to dismiss the complaint on the unproven basis that the plaintiff's objection, by virtue of being religious in nature, cannot be accommodated?

2. In light of the Free Exercise Clause, does a civil complaint for a refund of tax penalties state a claim on which relief can be granted by averring that the IRS categorically denies statutorily authorized penalty waivers to applicants whose religious convictions, if not accommodated, prevent them from voluntarily making timely payment of income tax, even though the IRS generally gives individualized consideration to taxpayers who allege that circumstances beyond their control impeded timely payment?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Packard and the United States).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSA COVINGTON PACKARD respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit filed on June 1, 1999, denying her appeal from an order under Fed.R.Civ.P. 12(b)(6) dismissing her complaint in a tax refund action.

OPINIONS BELOW

The summary opinion of the court of appeals (Kearse, Miner and McLaughlin, JJ.) is not officially published. It is available at 83 A.F.T.R.2d 99-2874, 99-2 U.S.T.C. ¶ 50,630, and 1999 WestLaw 500797; a copy is attached as Appendix A. The opinion of the United States District Court for the District of Connecticut (Goettel, J.) is published at 7 F.Supp.2d 143 (D.Conn. 1998); a copy is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court was filed and entered on June 1, 1999. A timely petition for rehearing was denied by Order dated November 19, 1999. Appx. C. This petition is timely filed within 90 days thereafter. Rules 13.1, 13.3; 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TEXT OF CONSTITUTIONAL PROVISION, FEDERAL STATUTES, RULES OF PROCEDURE, AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...."

The Religious Freedom Restoration Act provides in pertinent part:

> (a) **In general.** Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) **Exception.** Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) **Judicial relief.** A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. ...

42 U.S.C. § 2000bb-1.

§ 2000bb-2. **Definitions**

As used in this Act--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

* * *

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

42 U.S.C. § 2000bb-2.

§ 2000bb-3. **Applicability**

(a) **In general.** This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act [enacted Nov. 16, 1993].

* * * *

42 U.S.C. § 2000bb-2.

Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) **Claims for Relief.** A pleading which sets forth a claim for relief ... shall contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief ....

(b) **Defenses; Form of Denials.** A party shall state in short and plain terms the party's defenses to each claim asserted, and shall admit or deny the averments upon which the adverse party relies.

* * *

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively ... any ... matter constituting an avoidance or affirmative defense. * * *

Rule 12 of the Federal Rules of Civil Procedure Provides in pertinent part:

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted .... * * *

Because of their length, the pertinent provisions of the Internal Revenue Code and Treasury Regulations are reprinted in the Appendix, along with relevant implementing portions of the Internal Revenue Manual. Appx. D.

STATEMENT OF THE CASE

Petitioner Rosa Covington Packard is a Quaker pacifist, whose religious beliefs prevent her from voluntarily paying any tax, such as the federal income tax, which is used in substantial part to fund war preparation and warmaking activities. She filed a complaint for a refund of penalties and interest that had been added by the Internal Revenue Service to a federal income tax delinquency, claiming that both the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., and the Internal Revenue Code itself exempted her from being

required to pay additional sums on account of late payment of income tax obligations which resulted from obedience to the demands of her religious conscience, and that the refusal of the IRS to waive or abate the penalties violated the Free Exercise Clause, by discriminating against religiously-based showings of "reasonable cause." The district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6). Appx. B. The Second Circuit affirmed. Appx. A.

a. The Course of Proceedings

On January 26, 1998, the petitioner, Rosa Packard, filed a complaint in the United States District Court for the District of Connecticut, seeking a refund of certain penalties imposed on her by the Internal Revenue Service for late payment of federal income taxes and for failure to make quarterly estimated payments, for the tax years 1992 and 1993. The United States filed a motion under Fed.R.Civ.P. 12(b)(6) to dismiss the action for failure to state a claim on which relief could be granted.[1]

The district court granted the motion in a written opinion. Packard v. United States, 7 F.Supp.2d 143 (D.Conn. 1998); Appx. B. On appeal, the Second Circuit affirmed by unpublished summary order. Appx. A. That Order does not rely on or adopt the district court's opinion at all. Instead, the court of appeals found this case "not meaningfully distinguishable" from two recent appellate cases, one in the Second Circuit and the other in the Third. Appx. A2, citing Browne v. United States, 176 F.3d 25 (2d Cir. 1999), cert. denied, No. 99-632 (Jan.

[1] Respondent also moved pursuant to Fed.R.Civ.P. 12(b)(1) to dismiss petitioner's claim for a refund of interest payments, asserting lack of subject matter jurisdiction under 26 U.S.C. § 6404(g). Petitioner abandoned that claim.

18, 2000), and Adams v. Comm'r, 170 F.3d 173 (3d Cir. 1999), cert. denied, No. 99-798 (Jan. 18, 2000). Rehearing was denied. Appx. C.

b. Statement of Facts

Because this case was decided on motion under Fed.R.Civ.P. 12(b)(6), this Statement recites the facts as alleged in the complaint, which must be taken as true for purpose of these proceedings, as they should have been in the courts below. Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 2143 (1999) (citing United States v. Gaubert, 499 U.S. 315, 327 (1991)); Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 119 S.Ct. 1661, 1666 (1999).[2]

The total amount of delinquent tax for the two years involved in this case was about $7950, while the penalties assessed and then seized totaled about $1465, approximately another 18%. The penalty amounts which petitioner sought to recover by this refund action had been collected from her by levy, along with the principal amount of taxes due. The IRS deemed them delinquent, because in obedience to her Quaker religious conscience, she had refused to pay them to the IRS voluntarily. Petitioner had filed a timely and accurate tax return for each year, accompanied by a letter fully explaining her position.[3] Instead of making payment to the Internal

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[2] Where the district court failed to adhere to this rule in its decision, those errors are footnoted in this Statement or discussed in the Reasons which follow.

[3] The district court's memorandum decision asserts, apparently intending a pejorative implication, that petitioner did not explain her position on her tax returns but rather "simply silently refused to pay her taxes." Appx. B4 n.3; 7 F.Supp. at

Revenue Service, however, she had placed the full amounts due in an escrow account managed by her Quarterly Meeting of the Religious Society of Friends, in trust for the United States, as her letters disclosed.[4] Disregarding this arrangement, the IRS later collected the taxes by levy, along with penalties and interest, from petitioner's own bank account. Before suing, she sought refunds through all available administrative channels on the grounds pursued here, but these were refused.

_____(cont'd)

145. This accusation is contrary to the facts alleged in the complaint, which the lower court was bound to accept for purposes of ruling on the motion under Rule 12(b)(6). As the complaint states, she always sends an explanatory letter along with her return. Of course, to a Quaker, it is not necessarily a criticism to be accused of exercising her religion "silently."

[4] Under the terms of the Peace Tax Escrow Fund of the Purchase Quarterly Meeting of the Religious Society of Friends:

> • Tax money placed in the Fund would be voluntarily surrendered to the United States government whenever, but only if, that money could be placed in an account that supported only non-military spending, or if it could be earmarked and directed to accounts assigned to the support of non-military expenditures.
>
> • Ms. Packard received no financial benefit from money she deposited in the Fund.
>
> • Interest income generated from money deposited in the Fund is used by the Meeting "for life-affirming activities which may remove the occasion for war."
>
> • Any money Ms. Packard deposited in the fund could be returned to her only to replace money the government subsequently seized from her to cover taxes it claimed she owed. (CA2 App. 7a)

The complaint alleged that beginning in 1981, for tax year 1980, petitioner Packard has been unable to pay federal income taxes on a voluntary basis. She is prevented from doing so by her deeply-held religious conviction that Christ's advice to "love your enemies" and to "do good to those who hate you," Luke 6:27,[5] combined with the Ten Commandments admonition not to kill, Exodus 20:13, forbids her from paying any tax that will be expended in whole or in part for war or the preparation for war.

Petitioner did not seek a refund of the principal amount of tax collected, but only of the penalties, averring that her sincere religious principles:

> afford a reasonable cause for her late payment of tax to the Internal Revenue Service, particularly because the plaintiff voluntarily deposited the full amount of taxes due, on or before the due date for payment, in an escrow fund which will turn the money over to the IRS should the government make an accommodation of the plaintiff's religious scruple.

CA2 App. 11a, 15a, referring to IRC § 6651(a).[6] Further, she alleged that her religiously-grounded

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[5] Some translations have "persecute" rather than "hate."

[6] There is no civil penalty literally applicable to a complete failure to pay income tax; the penalty is for late payment. Measured as 0.5% per month of "the amount shown as tax on any return" until certain notices are issued, and then at 1% per month, id. § 6651(d), the penalty reaches its maximum level of 25% after about 2½ to 4 years. Id. § 6651(a)(2). Thus, in effect, the civil penalty for failure to pay federal tax at all is an addition of 25% of the tax amount. Forced collection from

conduct in relation to taxes constitutes "an unusual circumstance which make[s] it against equity and good conscience for the IRS to impose a penalty for her failure to pay estimated tax," quoting IRC § 6654(e)(3)(A).

On the basis of these averments, petitioner's complaint set forth two claims for relief, both statutory: that she was entitled to a refund of the penalties under the terms of the Internal Revenue Code itself, read in the light of well-established First Amendment Free Exercise principles, and that she was entitled to the same relief under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. In the latter connection, the complaint specifically alleged that the "imposition of penalties pursuant to 26 U.S.C. § 6651(a)(2) for late payment for taxes, and pursuant to 26 U.S.C. § 6654 for underpayment of estimated tax, are not the least restrictive means for the government to further its interest in the collection of taxes from" her.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(i). The United States District Court for the District of Connecticut had subject matter jurisdiction of this case under 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422(h)(3), in that the complaint sought a refund of income tax penalties, as authorized by id. § 7422. Jurisdiction in the court below rested upon 28 U.S.C. § 1291.

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_____(cont'd)

petitioner has never taken as long as two years.

REASONS FOR GRANTING THE WRIT

1. The decisions of the courts below depart from this Court's precedent in allowing a civil complaint to be dismissed under Rule 12(b)(6) despite well-pleaded allegations satisfying the elements of a statutory claim, on a basis that the Act requires the defendant-government, not the plaintiff-individual, to plead and prove. The result is effectively to exempt the Internal Revenue Service from compliance with the Religious Freedom Restoration Act in its decisions whether to waive discretionary penalties.

The decision of the court below, affirming the district court's Rule 12(b)(6) dismissal of petitioner's tax refund complaint, conflicts with the burden of proof imposed on the government under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq., as construed by this Court in City of Boerne v. Flores, 521 U.S. 507, 534 (1997). It also conflicts with this Court's decision in Gomez v. Toledo, 446 U.S. 635 (1980), which holds that when a statute allocates the burden of proof on a fact-laden issue to the defendant, making the point an affirmative defense, a complaint may not be dismissed under Fed.R.Civ.P. 12(b)(6) on the basis of that defense.

RFRA imposes a general ban on governmental burdening of religious exercise (42 U.S.C. § 2000bb-1(a); Statutes Involved, at 2 ante) but defines an "exception" under which a federal agency may "demonstrate" (with "evidence," id. § 2000bb-2(3)) that any infringement on religious exercise constitutes the "least restrictive means" of furthering a "compelling governmental interest." Id.

§ 2000bb-1(b). This "exception" is plainly in the nature of an affirmative defense, consistent with the general rule for construction of federal statutes.[7] Yet the government never satisfied its resulting burden of pleading under Fed.R.Civ.P. 8(c), much less its statutory burden of proof. This petition for certiorari should be granted in order to clarify that the IRS is not entitled to any special exemption either from the Rules of Civil Procedure or from generally-applicable laws of the United States.

In defiance of the Congressional mandate, the court below followed the opinion of another circuit (reviewing a decision after trial) which brushed off the statutory command that respondent "demonstrate" compliance with the governing legal standard as a merely "rhetorical question." Appx. A2, following Adams v. Comm'r, 170 F.3d 173, 179 (3d Cir. 1999). It likewise followed its own published precedent (reviewing a judgment on the pleadings) which denied a similar RFRA claim without any reference to the statutory language at all. See Browne v. United States, 176 F.3d 25, 26 (2d Cir. 1999), followed at Appx. A2. Neither of those precedents could have determined the proper disposition of a Rule 12(b)(6) case, even if they had not both misapplied RFRA.

Judge Noonan has aptly summarized some of RFRA's salient points:

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[7] See Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974) (Fair Labor Standards Act); Scher v. United States, 305 U.S. 251, 254 (1938) (exception in criminal prohibition "affords matter for affirmative defense"); cf. Automatic Canteen Co. v. FTC, 346 U.S. 61, 75 (1953) (Frankfurter, J.: "burden of showing a justification" is ordinarily "on the one who claims its benefit").

> The statute goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden': a government may burden religion only on the terms set out .... [Moreover, t]here is an unusual statutory incorporation of two decisions of the Supreme Court, to which Congress refers as guides to the purposes of the statute. ... [In addition, i]f there is a substantial burdening of a person's exercise of religion, the government must meet two tests. [1st] The government must 'demonstrate' that the application of the burden to this particular person furthers 'a compelling governmental interest.' [2d] The government must 'demonstrate' that this application 'is the least restrictive means of furthering that compelling governmental interest.' [Finally, w]hat is meant by 'demonstrate' is explicitly defined in terms of the government's burdens 'of going forward with the evidence and of persuasion.'

United States v. Bauer, 84 F.3d 1549, 1558 (9th Cir. 1996).[8] The beliefs which have led petitioner not to pay federal income tax voluntarily are indisputably religious

[8] Judge Noonan's comprehensive, scholarly study of the central role of religious freedom in the American constitutional system, *The Lustre of Our Country: The American Experience of Religious Freedom*, was published in 1998. The first words in Judge Noonan's book refer to the murderous persecution of Quakers for adhering to their beliefs in early New England, and he writes compellingly of those terrible days. Id. at 51-54.

in nature. See 42 U.S.C. § 2000bb-2(4) ("exercise of religion" under RFRA is same as under Constitution); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (discussing constitutional meaning of "religion").[9] At the core of petitioner Packard's religious belief is the fundamental tenet of Quaker theology that there is "that of God" in every person; she must therefore renounce all preparation for war. Petitioner's nonpayment of income tax is thus a mandated exercise of her religious beliefs, not a mere personal choice. Compare Appx. B2.

Petitioner has not disputed the established principle that the government has a compelling interest in collecting taxes. See United States v. Lee, 455 U.S. 252, 260 (1982); Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699-700 (1989); cf. Hamilton v. Board of Regents, 293 U.S. 245, 266 (1934) (Cardozo, Brandeis & Stone, JJ., concurring). The issue here is the government's avoidance of its duty to "demonstrate," that is, to prove by evidence, that it has employed the means of accomplishing that objective which are least restrictive of petitioner's religious liberty. While penalizing sincere

[9] While not all Quakers refuse to pay federal income taxes voluntarily, this fact does not lessen the protection available to the petitioner. See Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829 (1989) (individual's religious belief need not be church doctrine); Thomas v. Review Board, 450 U.S. 707, 715-16 (1981) (fact that some Jehovah's Witnesses will work on military production does not diminish religious nature of petitioner's refusal); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996) (Posner, Ch.J.) (religious practice need not be mandated for all adherents of religion for individual's exercise to be "substantially burdened" under RFRA).

religious objectors like petitioner may theoretically further the governmental interest in tax collection,[10] the respondent -- by definition on its motion to dismiss -- did not prove that adding civil penalties to the amount of tax which is forcibly collected following petitioner's refusal of voluntary compliance is the least restrictive means of furthering its legitimate interest.

The Act calls upon federal courts and agencies to apply "the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) ...." 42 U.S.C. § 2000bb(b)(1). The Sherbert and Yoder decisions, which RFRA particularly endorses and "incorporat[es]" (Bauer, 84 F.3d at 1558), are among this Court's most sympathetic decisions toward Free Exercise claims. It cannot be accidental that Congress chose those decisions to mention in the RFRA statement of purpose. "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

Under RFRA, a court cannot simply follow indiscriminately the holdings of any case decided before 1990

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[10] In fact, it is difficult to believe that the expense of forcible collection from those who cannot pay voluntarily on account of their religious pacifism really exceeds the sum ultimately collected. A recent study concludes that the enactment of a specific conscientious objector provision for such individuals would result in a slight revenue increase to the Treasury. Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 Wisc. Law Rev. 939, 943 n.18 ("revenues would increase because many war tax resisters would pay taxes that they currently do not pay"); see Religious Freedom Peace Tax Fund Bill, H.R. 2660, 105th Cong.

that rejected any sort of religious objection to any part of the federal tax system. The legislative history of the Act specifies that RFRA neither "approves nor disapproves of the result in any particular court decision involving the free exercise of religion." H.Rep. 103-88, 103d Cong., 1st Sess. 7 (1993); accord, S.Rep. 103-111, 103d Cong., 1st Sess. 9 (1993). Yet the court below followed a ruling that constitutional case law, decided under a different legal standard prior to RFRA's enactment, "dictated" its ruling. Adams, 170 F.3d at 180, adopted at Appx. A2. What a statute means and requires is what the statute says; when the courts apply a statute, they must do so according to its terms. See, e.g., Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 142 L.Ed.2d 881, 119 S.Ct. 755, 760 (1999). That meaning is not set forth either in committee reports or in an amorphous body of "pre-Smith case law." Appx. A2, adopting 170 F.3d at 179 (referring to Employment Division v. Smith, 494 U.S. 872 (1990)).

The Adams panel's holding, summarily adopted by the court below, "that appellee was not required to produce evidence under the 'least restrictive means' prong of RFRA in order to prevail," id. at 180, is directly contrary to the statutory language. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3); Statutes Involved, ante at 3. In the context of the instant case, it thus violates Rule 8(c) and constitutes an abuse of the Rule 12(b)(6) procedure.

By defining the term "demonstrates" in RFRA to mean "meets the burden of going forward with the evidence and of persuasion," 42 U.S.C. § 2000bb-2(3) (emphasis added), Congress legislated against courts' accepting mere argument in lieu of proof of government claims of inability to accommodate religious objections to

compliance with generally applicable legal obligations. Yet in support of a motion to dismiss under Rule 12(b)(6), argument is all the respondent could offer. The lower courts were bound to accept as true all the well-pleaded averments of the complaint. Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 2143 (1999); Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 119 S.Ct. 1661, 1666 (1999). Petitioner's complaint pleaded that the imposition of civil tax penalties substantially burdened her exercise of religion. Under RFRA, this alone was enough to avoid dismissal under Rule 12(b)(6). Gomez v. Toledo, 446 U.S. 635, 640 (1980).

For procedural reasons at least, RFRA's statutory structure dictated a result contrary to that reached below. In the procedural posture for disposition of the case that it sought, a Rule 12(b)(6) motion, respondent should not have been allowed to advance its affirmative defense of inability to achieve its compelling interest in tax collection through any less restrictive means. Only if the defendant pleads under Rule 8(c) that it has a compelling governmental interest and that it cannot fulfill that interest by any means less restrictive of the plaintiff's religious liberty than the one complained of is the "least restrictive means" issue placed before the court. Under the Rules, no response to an affirmative defense is required; that governmental claim is deemed automatically denied. Fed.R.Civ.P. 8(d).[11] The case must proceed to trial, or at least to summary judgment.

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[11] Since the validity of that defense is likely to be the issue on which the case turns, however, the court may wish to order a reply under Rule 7(a). See Crawford-El v. Britton, 523 U.S. 574, 140 L.Ed.2d 759, 779, 118 S.Ct. 1584, 1596 (1998); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and*

That petitioner anticipated this defense, by pleading her willingness to accept any of a number of reasonable accommodations, did not remove respondent's obligation to plead its position under Rule 8(c). Vance v. Terrazas, 444 U.S. 252, 269 n.11 (1980). Courts have a responsibility to apply RFRA's statutory "least restrictive means" test in a meaningful way, and the Rules of Civil Procedure must not be ignored so as to excuse the government from bringing forth evidence, at least, that the various less restrictive means suggested by petitioner Packard herself are not feasible. See Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit, 507 U.S. 163 (1993) (federal civil procedure pleading rules allow no exception for civil rights cases).

The courts below failed in their duty to enforce the plain language of the statute and rules when they upheld the respondent's mere assertion that so-called "voluntary compliance" -- an oxymoron in the case of a religious objector -- constitutes the "least restrictive means" of accomplishing its compelling objective of tax collection. Appx. A2, adopting Browne, 176 F.3d at 26. Indeed, "voluntary compliance" is not even an option for obtaining petitioner's taxes; in the exercise of her religious beliefs, she cannot pay voluntarily.[12]

_____(cont'd)

Procedure § 1185 (1990). If an averment of inability to accommodate is denied, however, either automatically or factually in a reply, neither a motion under Rule 12(b)(6) nor a motion for judgment on the pleadings under Rule 12(c) could properly be granted in a RFRA case.

[12] The requirement of collecting income tax from petitioner involuntarily itself results solely from respondent's total refusal, in arguable violation of RFRA, to accommodate

The issue the government tried impermissibly to raise under Rule 12(b)(6) in this case, which the courts below could not address under RFRA in the posture of a dismissal motion, is whether forcible collection with added penalties is the means of accomplishing the government's objective -- timely collection of the principal tax amount -- which is "least restrictive" of petitioner's religious liberty.[13] Indeed, this cannot be so, since the IRS could set out to collect the overdue tax by levy (as it eventually always does) while exercising its statutory discretion to waive the civil penalties.[14] Compulsory collection without added financial penalties is necessarily less restrictive of petitioner's free exercise than collection of a larger amount.

If the legislative history of RFRA proves anything, it is that no government agency is outside the obligation to comply with RFRA. The committee reports, House and Senate, expressly discuss the application of RFRA to the military, for example, as well as to prisons. H.Rep.

_____(cont'd)

petitioner's religious scruples against paying income tax into the General Fund. The petitioner does not raise that issue in this case, however.

[13] The need to collect forcibly at all, and thus the added cost to the government, could also be avoided if respondent would offer petitioner any form of accommodation with respect to the application of her payments, even a method as simple as how it handles taxpayers who check off that they want $3 to go to the Presidential Election Campaign Fund. See 26 U.S.C. §§ 6096 (taxpayer choice), 9006(a) (transfers to Fund).

[14] The issue of adding interest at the ordinary rate, while challenged in the district court, was not pursued on appeal, and is no longer presented by this case.

103-88, 103d Cong., 1st Sess. 8 (1993); S.Rep. 103-111, 103d Cong., 1st Sess. 9-12 (1993). Maintaining the national defense, according to the policies of Congress and the Administration, has always been considered a "governmental interest" of the most "compelling" kind; so has prison administration, to an only slightly lesser degree. These considerations had led this Court to require judicial deference and a lesser standard when religious rights were infringed in these contexts. See H.Rep. 103-88, at 7-8, discussing Goldman v. Weinberger, 475 U.S. 503 (1986), and O'Lone v. Shabazz, 482 U.S. 342 (1987).

Yet the legislative history confirms what the plain language states, that RFRA applies to all federal agencies, whether they be military branches or the IRS. 42 U.S.C. §§ 2000bb-2(1) (definition of "government"), 2000bb-3(a) (applicability to all agencies and departments). The Internal Revenue Code is thus not the only statute that the IRS must obey; RFRA is another and is equally binding. The Court's previous view that the devising of exceptions in tax matters is exclusively a legislative function (see Hernandez v. Comm'r, 490 U.S. at 700), must give way to the directive of Congress itself in RFRA where the conflict is genuinely religious.

This Court's conclusion in United States v. Lee that "the tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates the religious belief," 455 U.S. at 260, is not controlling. RFRA places the burden on the government to "demonstrate" that it has no way to satisfy its compelling interest without "substantially burdening" the exercise of an individual's religious beliefs. The example in Lee itself is quite apt.

The Court held in Lee that the Free Exercise Clause did not give the Amish farmer and carpenter employees involved in that case, who were outside the protection of IRC § 1402(g), a right not to participate in the Social Security system. Justice Department lawyers argued, and this Court accepted in that 1982 case, that no further exemption for the Amish than then existed could be allowed without risking the fiscal soundness of Social Security. But this proved false in fact. In the 1988 Tax Bill, Congress enacted the precise additional exemption that the Lee Court had held unnecessary, or even impossible. Pub.L. 100-647, § 8007 (Oct. 22, 1988), adding new 26 U.S.C. § 3127. This tale illustrates the difference between the standard under the Free Exercise Clause (even as sometimes construed before Smith) and that under RFRA. Congress legislated in RFRA against courts' accepting mere argument in lieu of proof of government claims of inability to accommodate.

In accepting the respondent's RFRA-defeating approach, the courts below rendered a decision in conflict with the statutory mandate. Petitioner's case well illustrates how the same religion-based claim can give rise to both a First Amendment Free Exercise argument, as described under Point 2 below, and a statutory RFRA argument. Contrary to the approach taken summarily by the court below, these two types of claims call for distinct lines of analysis and impose different burdens on the parties. Certiorari should be granted to enforce the Federal Rules of Civil Procedure in the context of RFRA's statutory language and to uphold the Congressional policy that federal government agencies meet a burden of proof under the "least restrictive means" test before unnecessarily burdening the exercise of sincere religious convictions.

2. The lower courts allowed an application of the Internal Revenue Code's penalty provisions which violates this Court's binding precedent under the Free Exercise Clause, when they permitted the IRS to discriminate against religious reasons, as compared with all other equivalent impediments to individual compliance with a generally applicable law.

Even if the Religious Freedom Restoration Act did not, for whatever reason, bar a Rule 12(b)(6) dismissal in this case, the court below also ignored this Court's cases construing the Free Exercise Clause of the First Amendment when it upheld the rejection of petitioner Packard's district court refund action. Seeking an even-handed application of the statutory penalty waiver provisions, petitioner relied on the Internal Revenue Code and regulations themselves, read in the light of constitutional doctrine. This Court should grant certiorari to clarify the application of the Free Exercise equal-treatment doctrine in the present context.

Rather than address the constitutional issue, the court of appeals relied on its prior decision in Browne, 176 F.3d at 26, and that of the Third Circuit in Adams, 170 F.3d at 180-82, and summarily affirmed the district court's dismissal. The circuit precedent which the court below followed both misstates the nature of petitioner's religious objection and conflicts with settled doctrine. In that prior case, the court held:

> The [plaintiffs'] First Amendment claim fails because they are required to comply with the tax laws despite religious-based disagreement with the allocation of certain funds. ...

> Furthermore, they are not entitled to force the IRS to levy the taxes due at additional time and expense.

Browne v. United States, 176 F.3d at 26, adopted at Appx. A2. Petitioner's claim is not predicated on a "religious-based disagreement with the allocation of certain funds," although she may well harbor such "disagreement." Rather, it is based on the law's compulsion that she act in a manner which is precluded by her exercise of religion -- in other words, that she "voluntarily" pay for military activities and war preparation.

The decision of the court below also missed the mark in its Free Exercise rationale. In Adams, the Third Circuit relied on a "body of case law related to war tax protesters," 170 F.3d at 181, referring to cases cited id. at 178, none of which involved equal-treatment challenges to the refusal to waive or abate penalties. Even if petitioner had no legal "excuse," id., for refusing to pay without accommodation (as those cases all held, for various reasons), that says nothing about waiver of these waivable civil penalties.

The court below failed to follow this Court's cases interpreting the Free Exercise Clause of the First Amendment when it affirmed the district court's dismissal of the petitioner's complaint as having failed to state a claim on which relief could be granted, even though she alleged that the IRS failed to give equal consideration to her religious convictions as it gives to other individual circumstances that prevent compliance with federal income tax obligations.

Congress allows the penalty for late payment of tax to be waived, in the discretion of the Commissioner,

where there is "reasonable cause." 26 U.S.C. (IRC) § 6651(a)(1). Likewise, the penalty for failure to make quarterly estimated payments is waivable when the omission was due to an "unusual circumstance" which makes it "against equity and good conscience" to impose that penalty. Id. § 6654(e)(3)(A). The Third Circuit case relied on by the court below held that because the regulations in question were "uniform and facially neutral," Adams, 170 F.3d at 181 n.10, they did not allow the sort of "individual exemption" discussed in Employment Division v. Smith, 494 U.S. 872, 884 (1990) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality), explaining Sherbert v. Verner, 374 U.S. 398 (1963)). Browne, the "controlling" Second Circuit case, Appx. A2, did not even address this issue, citing instead a different point from Smith, rejecting an argument that petitioner never advanced. This Court should grant a writ of certiorari to correct the lower courts' serious misunderstanding of precedent and deviation from an important aspect of First Amendment Free Exercise doctrine.

In Sherbert v. Verner, a Seventh Day Adventist had been denied unemployment insurance benefits, because she refused to work on Saturdays, her sabbath. The South Carolina law under which she was refused provided that:

> to be eligible for benefits, a claimant must be "able to work and ... is available for work"; and, further, that a claimant is ineligible for benefits "[i]f ... he has failed, without good cause ... to accept available suitable work when offered him by the employment office or the employer ...."

374 U.S. at 400-01. This Court reversed the denial of benefits on the basis that the state's rejection of her claim was not the "least restrictive means" of achieving a "compelling governmental interest."

In Smith, the Court determined that it would no longer adhere to that formulation as a general statement of Free Exercise principle. 494 U.S. at 878-79. The Court affirmed, however, a different rationale for the judgment in Sherbert and the cases which follow it[15]:

> [O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

Smith, 494 U.S. at 884, quoting Bowen v. Roy, 476 U.S. at 708 (1986) (plurality). Because Congress has mandated the same sort of "system of individual exemptions" from certain tax penalties, the equal-consideration rationale of Bowen v. Roy applies to this case. The Free Exercise Clause therefore forbids the Internal Revenue Service from "refus[ing] to extend" its individualized system of waivers of penalties for late payment and failure to estimate to cases involving "religious hardship," such as this one. The court below utterly ignored that binding rule when it affirmed the district court's dismissal of the petitioner's complaint as having stated no claim upon which relief could be granted.

The civil penalty provisions involved in this case provide that no penalty shall be imposed for late payment

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[15] See Frazee v. Illinois Dept. of Employ. Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment App. Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981).

if such lateness is "due to reasonable cause and not due to willful neglect," IRC §§ 6651(a)(1), and that no estimated tax penalty shall be imposed if the Secretary determines that "by reason of ... unusual circumstances the imposition of such addition to tax would be against equity and good conscience." IRC § 6654(e)(3)(A). As with the unemployment insurance standard discussed in Sherbert, even though these Tax Code provisions are "generally applicable, [and] religion-neutral," Smith, 494 U.S. at 886, they create a "system of individual exemptions." Roy, 476 U.S. at 708. Respondent may "not refuse to extend that system to cases of 'religious hardship' without compelling reason." Id. By choosing to respond to this case by moving to dismiss, respondent necessarily failed to demonstrate any such reason.

Indeed, under the terms of the implementing regulation, waiver of this penalty was mandatory in petitioner's case, unless discrimination against religious reasons is authorized: "A taxpayer will be considered to have exercised ordinary business care and prudence if [s]he made reasonable efforts to conserve sufficient assets in marketable form to satisfy h[er] tax liability and nevertheless was unable to pay ... the tax when it became due." Treas.Reg. (26 C.F.R.) § 301.6651-1(c)(1) (emphasis added); Appx. D6. Petitioner's consistent practice of depositing the full amount of tax shown on her return in the Quaker escrow account, which she fully disclosed to the IRS, thus demonstrates "ordinary business care and prudence" in just the way that the regulation views that concept.

Accepting the averments of her complaint as true, the petitioner also stated a claim for a "reasonable cause" waiver of the late payment penalty on the alternate basis

of "undue hardship." Treas. Reg. § 301.6651-1(c)(1) ("failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he ... would suffer an undue hardship (as described in § 1.6161-1(b) of this chapter) if he paid on the due date."); Appx. D5. As explained in Treas.Reg. § 1.6161-1(b), "'undue hardship' means more than an inconvenience"; rather, the hardship must be at least equivalent to a "substantial financial loss, for example ...." Appx. D3. Being forced by the government to abandon the exercise of one's religion easily meets any objective standard of "undue hardship."

Only the respondent's improper refusal to consider religious reasons on an equal footing with other personal reasons could support the IRS refusal to waive these penalties in petitioner's case. See Treas. Reg. § 601.106(b) ("the appeal procedures do not extend to cases involving solely the failure or refusal to comply with the tax laws because of moral, religious, political, constitutional, conscientious, or similar grounds"); accord, Int.Rev.Man. 8.1.2.2.5; Appx. D7, D10.

Whatever the legitimacy of the IRS's predetermined refusal to consider "moral, ... political, constitutional, conscientious, or similar grounds" for noncompliance which are not "religious," the Free Exercise Clause invalidates its categorical exclusion of that specially protected category from at least equal consideration. Bowen v. Roy, 476 U.S. at 708. See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542-43 (1993).

The respondent's own Internal Revenue Manual ("IRM"), designed to guide IRS agents in making these determinations, emphasizes the general flexibility of the

regulatory standard in all other cases. See IRM 1218, Policy Statement P-2-7; IRM 120.1.1.3.1(1),(3)1,(5); IRM 120.1.1.3.1.1(1); IRM 120.1.1.3.1.2(1); IRM 120.1.2.1.3(2)1. These portions of the IRM are reproduced in Appendix D8-D12. The Manual lists several situations in which penalties are not to be asserted or should be abated, even though a taxpayer has consciously decided not to pay tax.

For example, hardship imposed by the death of a family member is recognized as reason enough not to impose a penalty for late payment. Policy Smt. P-2-7, example (1); accord, IRM 120.1.1.3.1.2.4. This example is not based on any sort of physical impossibility. A taxpayer whose father dies and who does not pay on time so that she may attend the funeral, or because she is too distraught, has made a conscious decision, although under pressing circumstances, that attending to funeral-related concerns is more important than timely payment of tax.

In this case, the petitioner's complaint properly alleged that her "religious beliefs ... prevent her from voluntarily paying a tax, any part of which is expended for war or the preparation for war." CA2 App. 11a, 15a. As construed by this Court, the "principle underlying the IRS regulations and practices" under the "reasonable cause" standard is "that a taxpayer should not be penalized for circumstances beyond his [or her] control ...." United States v. Boyle, 469 U.S. 241, 248 n.6 (1985). Unless action compelled by religious convictions is categorically excluded from this waiver provision, the district court's dismissal of petitioner's complaint for failure to state a claim on which relief could be granted, affirmed

by the court of appeals, was erroneous, because petitioner was without fault in her late payment.[16]

The Internal Revenue Code also provides discretionary authority to waive the civil penalty for failure to pay estimated tax. That section provides that "No addition to tax shall be imposed ... to the extent the Secretary determines that by reason of ... unusual circumstances the imposition of such addition to tax would be against equity and good conscience." 26 U.S.C. § 6654(e)(3). Petitioner's religious beliefs, coupled with the requirement of her Quaker religion that she act in accordance with that leading, are all too "unusual," as they have always been since the founding of the Religious Society of Friends in 1650. The American tradition of tolerance and respect for religious conscience surely makes it "against equity and good conscience" to penalize her for adhering to those beliefs and acting accordingly in

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[16] In Ehlert v. United States, 402 U.S. 99, 105 (1971), this Court expressly declined to "take sides in the somewhat theological debates about the nature of 'control' over one's own conscience" that had been addressed by certain lower court decisions under the draft law. The Court ruled that a post-induction opportunity to seek discharge from the Army as a conscientious objector, without having to bear arms within the military while pursuing that discharge, justified the Selective Service System in refusing to hear CO claims that "crystallized" after receipt of an induction notice, despite a procedure calling for cases to be reopened based on the emergence of circumstances that were "beyond [the draftee's] control." See United States v. Jenkins, 420 U.S. 358, 361-62 (1975). The issue of whether a person's religious beliefs are within her "control" need not be decided here either, because the Treasury Regulations and IRS Manual do not exclude difficult choices from the "reasonable cause" standard.

relation to her income tax obligations. By affirming the district court's dismissal of petitioner's complaint, the court of appeals improperly relieved the respondent from its constitutional duty under the rationale of the Roy plurality, as endorsed by the majority in Smith.

The court below missed a truly fundamental point in following the Third Circuit decision which refers to "civil disobedience" as constituting only a "slightly different context" from religious convictions that prevent compliance with a legal obligation of general applicability. See Appx. A2, approving Adams, 170 F.3d at 182. It is not a form of "civil disobedience" to request a fair application of the exemptions from penalty that Congress has enacted.[17] Laws which interfere, in particular cases, with religious exercise cannot be casually brushed off by reference to "sincerely felt political and religious beliefs" which may require "facing the consequences." Id. One of those "consequences," under the Constitution and laws of the United States, cannot be the refusal of government agencies to apply discretionary penalty waivers that are triggered by a showing of "reasonable cause."

Whether resolved by a holding under a straightforward construction of the Internal Revenue Code that religious inability to comply is itself a "reasonable cause" to refrain from adding penalties to a tax delinquency,[18] or

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[17] In our system, "civil disobedience" must be understood as action in violation of "formally binding general law," on the basis of principle, and then only when undertaken "without challenging the validity of the law." Alexander M. Bickel, *The Morality of Consent* 99 (1975).

[18] For the same reasons, penalizing petitioner additionally for her failure to pay on the basis of religious principle, an

by holding that the addition of penalties is itself unnecessarily restrictive of religious liberty under RFRA, or by applying a First Amendment equal treatment principle, the district court's decision that the petitioner failed to state a claim on which relief could be granted should have been reversed. A writ of certiorari should be granted to correct the lower courts' departure from this Court's settled precedent under the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, petitioner ROSA COVINGTON PACKARD prays that this Court grant her petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
JAMES H. FELDMAN, JR.
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200
Attorneys for Petitioner

February 17, 2000.

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obviously "unusual circumstance," would a fortiori be "against equity and good conscience." IRC § 6654(e)(3).

APPENDIX A

Slip Copy
1999 WL 500797
83 A.F.T.R.2d 99-2874, 99-2 U.S.T.C. ¶ 50,630
Unpublished Disposition

Rosa C. PACKARD, Plaintiff-Appellant,
v.
UNITED STATES of America, Defendant-Appellee.

No. 98-6223.
United States Court of Appeals,
Second Circuit.
June 1, 1999.

Peter Goldberger, Ardmore, Pa., for Appellant.
Michelle B. O'Connor, Tax Div., U.S. Dep't of Justice, Washington, D.C., for Appellee.

Before KEARSE, MINER and McLAUGHLIN, Circuit Judges.

SUMMARY ORDER*

*1 Appeal from the United States District Court for the District of Connecticut.

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* THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF

This cause came on to be heard on the record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the authority of Browne v. United States, No. 98-6124, 1999 WL 304399 (2d Cir. Mar. 24, 1999), slip op. 3499 (opinion filed May 14, 1999), and Adams v. Commissioner of Internal Revenue, 170 F.3d 173 (3d Cir. 1999), which are not meaningfully distinguishable from the present case.

We have considered all of plaintiff's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:
KAREN GREVE MILTON, Acting Clerk
by:
\s\ Lucille Carr_____

_____(continued)

THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

APPENDIX B

7 F.Supp.2d 143
82 A.F.T.R.2d 98-5928, 98-2 U.S.T.C. ¶ 50,589

Rosa C. PACKARD, Plaintiff,
v.
UNITED STATES of America, Defendant.

No. 3:98 CV 134 GLG.
United States District Court,
D. Connecticut.
June 4, 1998.

*144 David N. Rosen, Rosen & Dolan, P.C., New Haven, CT, Peter David Goldberger, Ardmore, PA, for Plaintiff.
David X. Sullivan, U.S. Attorney's Office, New Haven, CT, for U.S.

MEMORANDUM DECISION

GOETTEL, District Judge.

Plaintiff has been a tax protester for the last sixteen years. She has filed tax returns but failed to pay the tax due thereon claiming that it is contrary to her deeply held religious beliefs (she is a member of the Religious Society of Friends "Quakers") against paying for wars or national defense. The Government has been collecting her tax by levying on her bank account which included the assessment of penalties and interest for late payments. Pursuant to 28 U.S.C. § 1346(a)(1), plaintiff has sued to recover the penalties collected from her for

the tax years 1992 and 1993.[1]

The Government moves to dismiss this action contending that it fails to state a claim with respect to the sections of the Internal Revenue Code requiring penalties. *See* 26 U.S.C. §§ 6651(a)(2) & 6654. Plaintiff argues that this case cannot be decided on a motion to dismiss since she is entitled to a trial to establish that she had a sincere religious belief based on opposition to war and therefore opposes the payment of taxes which could be used to fund war.[2] For purposes of this motion, the

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[1] Due to the prerequisites to filing suit in federal court under 28 U.S.C. § 1346(a)(1), see 28 U.S.C. § 7422(a), *Flora v. United States*, 362 U.S. 145, 157-58, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960), and *Shore v. United States*, 9 F.3d 1524, 1527-28 (Fed. Cir. 1993), plaintiff has alleged facts in her complaint that she filed claims for refunds, Compl. pp 25-29, 46-50, and that she paid all penalties through IRS levies on her bank account, Compl. pp 19-22, 40-43. We note that the Anti-Injunction Act forbids a district court from enjoining the assessment or collection of any tax. 26 U.S.C. § 7421. This ban partly exists to further the purpose of requiring "that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962). Because plaintiff is seeking only a refund for penalties already paid based on her 1992 and 1993 tax returns, and not an injunction against the payment of any future, potential penalties, we properly have jurisdiction over her complaint under section 1346. Plaintiff also seeks to recover the interest charged on the late payments but her counsel now concedes that we have no jurisdiction over that claim.

[2] We note that, for the years in question, national defense expenditures were only a small part of the national

Government concedes that plaintiff has deeply held religious principles in opposition to war and that it was these principles which caused her to refuse to pay her taxes so that no trial is necessary.

There has been a long history of cases in which citizens have contested their obligation *145 to pay taxes on religious grounds. Almost thirty years ago, the Ninth Circuit rejected such religious objections finding that the Income Tax Acts do not aid a particular religion or punish anyone for their religious beliefs. It commented that "[o]n matters religious, it is neutral" and noted that the ability of the Government to function could be impaired if persons could refuse to pay taxes because they disagreed with the Government's use of tax revenues. *Autenrieth v. Cullen*, 418 F.2d 586, 588-89 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036, 90 S.Ct. 1353, 25 L.Ed.2d 647 (1970). The Supreme Court took the same tack in *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), by holding that the payment of social security taxes was compulsory even if it violated Amish religious beliefs and interfered with their free exercise of religion. Earlier attempts by Quakers to object to the collection of taxes through withholding were also rejected. *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 95 S.Ct. 13, 42 L.Ed.2d 7 (1974); see also *United States v. Philadelphia Yearly Meeting of*

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Government's expenses paid for from income tax collections. Unlike some Quakers, plaintiff objects to paying any tax rather than deducting that portion which she believes the Government allocates to the Department of Defense. See *Browne v. United States*, Civ. No. 1:97-349 (D.Vt. May 14, 1998) discussed *infra*.

Religious Soc'y of Friends, 753 F.Supp. 1300 (E.D.Pa. 1990) (enforcing IRS levies against the salaries of two members of a Quaker organization). Congress has also rejected these "war tax deductions" as illustrated by its passage in 1982 of section 6702 of the Internal Revenue Code assessing an immediate civil penalty of $500 against taxpayers filing frivolous returns such as claiming a war tax deduction.[3]

Section 6651(a)(2) provides a penalty of one-half of a percent per month (up to a maximum of 25%) of the tax due on a return for each month the tax due remains unpaid. The penalty is automatic unless the failure to timely pay "is due to reasonable cause and not due to willful neglect." 26 U.S.C. § 6651(a)(2). In refund suits, the taxpayer bears the burden of establishing reasonable cause and no willful neglect, *United States v. Boyle*, 469 U.S. 241, 245, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985), and whether a plaintiff meets his or her burden is an issue of law. *Id.* at 249 n. 8, 105 S.Ct. 687.

Plaintiff argues that under the *Boyle* rationale, she was without fault in not making payment because she was unable to make such a payment "by a reason beyond her control: to wit, the requirement of religious conscience that she not voluntarily pay a tax that will support war or war preparations." Pl.'s Resp. to Def.'s Mot. to Dismiss, at 6. She does not contend that she is a member of a religious body which opposes the payment of taxes or that the Society of Friends could or would take any steps against her by virtue of her making payments.

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[3] Plaintiff was not subject to such a penalty because her tax return did not make such a claim and she simply silently refused to pay her taxes.

This Court rejects the argument that following one's conscience for religious, philosophical, moral or other reasons amounts to a compulsion. It is a considered decision. While plaintiff can, like many other persons in the past, engage in acts of civil disobedience, she must expect to pay society's price if she does so.

Plaintiff concedes that she can be compelled to pay income tax despite her religious beliefs. She argues, however, that she should not be assessed a penalty for refusing to do so because she had "reasonable cause" for her failure to pay and is therefore entitled to the return of the penalty collected. The reasonable cause argument, however, was rejected in the foregoing cases as to a refusal to pay and it follows that the assessment of the penalty is in the same posture. This is particularly true since the Internal Revenue Code, as noted above, imposes a specific penalty on taxpayers asserting a "war tax deduction." Consequently, we find that plaintiff has failed to state a claim for relief under section 6651.

*146 Plaintiff makes a further argument that under section 6654 she has established "unusual circumstances" so that the imposition of the penalty "would be against equity and good conscience." 26 U.S.C. § 6654(e)(3)(A). There is nothing unusual in these circumstances. Religious objections to various types of taxes have been quite often asserted, and continually rejected. As we noted earlier, if she wishes to engage in civil disobedience, she must expect to pay the price. *Kahn v. United States*, 753 F.2d 1208, 1215-16 (3d Cir. 1985).

Plaintiff advances other arguments, such as a Free Exercise clause claim, which are equally unavailing under the existing precedents. The Government has a compel-

ling interest in the collection of taxes and in the assertions of penalties to compel their payments.

The only new argument advanced by the plaintiff is that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4, has changed the existing law since imposing penalties substantially burdens her exercise of religion which is prohibited by the RFRA. The pertinent part of the RFRA provides:

> (a) **In general.** Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) **Exception.** Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) **Judicial Relief.** A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

42 U.S.C. § 2000bb-1. Indeed, plaintiff argues that the structure of the RFRA prevents the issue from even being considered on a motion to dismiss because she argues that the exception in subparagraph (b) constitutes an affirmative defense dependent upon facts which

defendant would have to prove at trial and which she is not required to plead. We do not agree with that procedural interpretation. To the extent that plaintiff has claimed that the RFRA supports her suit for return of penalties already collected, it is her burden to establish either that the assessment of such penalties was not a compelling government interest or that it was not the least restrictive means of furthering that Government interest.

As the Supreme Court has noted, the RFRA can be a source of extreme mischief. As applied to state and local governments, it has been found to be unconstitutional. *City of Boerne v. Flores*, --- U.S. ---, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Plaintiff cannot seriously argue that there is no compelling government interest in collecting taxes. Rather, she contends that assessing penalties is not the least restrictive means of furthering that interest. Plaintiff urges this Court to accept the argument that the least restrictive means of collecting taxes is to require the IRS to levy upon a taxpayer's bank account. Indeed, plaintiff argues that the penalties are ineffective because she has been refusing to pay her taxes voluntarily for almost twenty years and that the Government has found a means of collecting them nevertheless. (We observe that the fact that she has filed this suit indicates her displeasure at paying the penalties).

We reject the argument that it is less restrictive to levy on assets than to impose penalties in order to further the compelling governmental interest of collecting taxes, especially here, where plaintiff never stated on her tax returns why she refused to pay taxes. If we were to accept plaintiff's argument, it would place a burden on the Government to find a taxpayer's assets, if there are

any assets at all upon which the IRS could levy. Also, if the Government could not assess a penalty for the late or non-payment of taxes, we would be opening Pandora's Box to tax evasion because, in effect, plaintiff's argument says to all who will not pay taxes for religious, philosophical, moral or other reasons *147 that the Government must first levy before imposing a penalty. We refuse to accept such an impractical and unworkable system.

The argument that the Government's means of coercing tax payment with penalties for non-payment violates the RFRA was effectively rebutted in a recent decision by Chief Judge Murtha of the District of Vermont in *Browne v. United States*, Civ. No. 1:97-349 (D.Vt. May 14, 1998).[4] He noted that voluntary compliance with the tax code is the least restrictive approach possible and noted:

> Undoubtedly, many Americans disagree with some discrete potential use of their tax monies. Allowing individuals like the plaintiffs to withhold a portion of their due taxes would encourage chaos in that every individual with an objection to a particular governmental expenditure would be able to unilaterally impose additional, time-consuming administrative burdens on the IRS. Furthermore, acceptance of the plaintiffs' arguments would encourage more governmental involvement in religious

---

[4] These taxpayers paid most of their taxes but withheld 28% which they computed as representing the portion of their taxes allocated to the Department of Defense.

> matters in that the IRS would be required to assess the genuineness of each tax protester's religious beliefs. *See Lee*, 455 U.S. at 252 n. 2 [102 S.Ct. 1051]. Finally, it is difficult to imagine a means of compliance with the tax laws which is less restrictive than the voluntary compliance to which the plaintiffs object.

Id. slip op. at 8-9. Assuming that the RFRA is constitutional as applied to the Government's collection of taxes, we see no less restrictive means of inducing the payment of taxes by taxpayers generally or, for that matter, for religious tax protestors. Since the income tax system is a self-reporting and self-assessment one based on voluntary actions, the Government cannot be compelled to resort to cumbersome methods to encourage compliance. To do so "will affect adversely taxpayers' willingness to perform under our voluntary assessment system." *Flora v. United States*, 362 U.S. 145, 176-77 n. 43, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960) (quoting Riordan, *Must You Pay Full Tax Assessment Before Suing in the District Court?*, 8 J. Tax'n 179, 181 (1958)). Plaintiff's argument about using a less restrictive means of compelling compliance by levying taxpayers' assets is at odds with the Government's compelling interest in the collection of taxes under the present system. We therefore find that the RFRA affords no relief to plaintiff from the penalty provisions of the Internal Revenue Code. The Government's motion to dismiss (document # 5) is GRANTED. The Clerk will enter judgment for defendant.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FILED
NOV 19 1999
KAREN GREVE MILTON, ACTING CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
40 Foley Square
New York, NY 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of November One thousand nine hundred and ninety nine

---

Rosa C. Packard,
Plaintiff-Appellant,

v. 98-6223

United States of America,
Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Plaintiff-Appellant Rosa C. Packard.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that not such judge has requested that a vote be taken thereon.

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk

By: /s/Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX D

Section 6651 of the Internal Revenue Code provides, in pertinent part:

§ 6651. **Failure to file tax return or to pay tax.**

(a) **Addition to the tax.**

In case of failure --

* * *

(2) to pay the amount shown as tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; * * *

(b) **Penalty imposed on net amount due.**

For purposes of --

* * *

(2) subsection (a)(2), the amount of tax shown on the return shall, for purposes of computing the addition for any month, be reduced by the amount of any part of the tax which is paid on or before the beginning of such month and by the amount of any credit against the tax which may be claimed on the return, * * * *

26 U.S.C. § 6651.

Section 6654 of the Internal Revenue Code, 26 U.S.C., provides, in pertinent part:

§ 6654. **Failure by individual to pay estimated income tax.**

(a) **Addition to the tax.** Except as otherwise provided in this section, in the case of any underpayment of estimated tax by an individual, there shall be added to the tax under chapter 1 and the tax under chapter 2 for the taxable year an amount determined by applying-

(1) the underpayment rate established under section 6621,

(2) to the amount of the underpayment,

(3) for the period of the underpayment.

* * * *

(e) **Exceptions.**

* * *

(3) **Waiver in certain cases.**

(A) **In general.** No addition to tax shall be imposed under subsection (a) with respect to any underpayment to the extent the Secretary determines that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience.

* * * *

26 U.S.C. § 6654.

The Treasury Regulations, 26 C.F.R., provide, in pertinent part:

§ 1.6161-1 **Extension of time for paying tax or deficiency.**

* * * *

(b) Undue hardship required for extension. An extension of the time for payment shall be granted only upon a satisfactory showing that payment on the due date of the amount with respect to which the extension is desired will result in an undue hardship. The extension will not be granted upon a general statement of hardship. The term "undue hardship" means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer from making payment on the due date of the amount with respect to which the extension is desired. If a market exists, the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship.

* * * *

26 C.F.R. § 1.6161-1.

§ 301.6651-1 **Failure to file tax return or to pay tax.**

(a) Addition to the tax--

* * *

(2) Failure to pay tax shown on return. In case of failure to pay the amount shown as tax on any return (required to be filed after December 31, 1969, without regard to any extension of time for filing thereof) specified in subparagraph (1) of this paragraph (a), on or before

the date prescribed for payment of such tax (determined with regard to any extension of time for payment), there shall be added to the tax shown on the return the amount specified below unless the failure to pay the tax within the prescribed time is shown to the satisfaction of the district director, the director of the service center, or, as provided in paragraph (a) of this section, the Assistant Regional Commissioner (Alcohol, Tobacco and Firearms), to be due to reasonable cause and not to willful neglect. The amount to be added to the tax is 0.5 percent of the amount of tax shown on the return if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate.

* * * *

(c) **Showing of reasonable cause.** (1) Except as provided in subparagraphs (3) and (4) of this paragraph (b), a taxpayer who wishes to avoid the addition to the tax for failure to file a tax return or pay tax must make an affirmative showing of all facts alleged as a reasonable cause for his failure to file such return or pay such tax on time in the form of a written statement containing a declaration that it is made under penalties of perjury. ... If the district director, the director of the service center, or, where applicable, the Regional Director, Bureau of Alcohol, Tobacco and Firearms, determines that the delinquency was due to a reasonable cause and not to willful neglect, the

addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in § 1.6161-1(b) of this chapter) if he paid on the due date. In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, for example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of his assets and anticipated income will be insufficient to pay his tax, has not exercised ordinary business care and prudence in providing for the payment of his tax liability. Further, a taxpayer who invests funds in speculative or illiquid assets has not exercised ordinary business care and prudence in providing for the payment of his tax liability unless, at the time of the invest-

ment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay his tax or it can be reasonably foreseen that the speculative or illiquid investment made by the taxpayer can be utilized (by sale or as security for a loan) to realize sufficient funds to satisfy the tax liability. A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.

26 C.F.R. § 301.6651-1.

PART 601 -- **STATEMENT OF PROCEDURAL RULES**

§ 601.106 **Appeals functions.**

(a) **General.** (*1*)(i) There are provided in each region Appeals offices with office facilities within the region.

* * *

(ii) Certain officers of the Appeals offices may represent the regional commissioner in his/her exclusive and final authority for the determination of--

* * * *

(c) Liability for additions to the tax, additional amounts, and assessable penalties provided under Chapter 68 of the Code, in any case originating in the office of any district director situated in the region, or in any case in which jurisdiction has been transferred to the region.

(iii) The taxpayer must request Appeals consideration.

* * * *

(iv) Sections 6659(a)(1) and 6671(a) provide that additions to the tax, additional amounts, penalties and liabilities (collectively referred to in this subdivision as "penalties") provided by Chapter 68 of the Code shall be paid upon notice and demand and shall be assessed and collected in the same manner as taxes. Certain Chapter 68 penalties may be appealed after assessment to the Appeals office. This post-assessment appeal procedure applies to all but the following Chapter 68 penalties:

(a) Penalties that are not subject to a reasonable cause or reasonable basis determination (examples are additions to the tax for failure to pay estimated income tax under sections 6654 and 6655);

* * * *

The appeal may be made before or after payment, but shall be made before the filing of a claim for refund. Technical advice procedures are not applicable to an appeal made under this subdivision.

* * * *

(2) The authority described in subparagraph (1) of this paragraph does not include the authority to:

[exceptions inapplicable]

(b) Initiation of proceedings before Appeals. In any case in which the district director has issued a preliminary or "30-day letter" and the taxpayer requests Appeals consideration and files a written protest when required (see paragraph (c)(1) of Secs.

601.103, (c)(1) and (c)(2) of 601.105 and 601.507) against the proposed determination of tax liability, except as to those taxes described in paragraph (a)(3) of this section, the taxpayer has the right (and will be so advised by the district director) of administrative appeal to the Appeals organization. However, the appeal procedures do not extend to cases involving solely the failure or refusal to comply with the tax laws because of moral, religious, political, constitutional, conscientious, or similar grounds. * * * After review of any required written protest by the district director, the case and its administrative record are referred to Appeals. Appeals may refuse to accept a protested nondocketed case where preliminary review indicates it requires further consideration or development. No taxpayer is required to submit a case to Appeals for consideration. Appeal is at the option of the taxpayer. After the issuance by the district director of a statutory notice of deficiency, upon the taxpayer's request, Appeals may take up the case for settlement and may grant the taxpayer a conference thereon.

(c) **Nature of proceedings before Appeals.** Proceedings before Appeals are informal. * * *

* * * *

26 C.F.R. § 601.106.

The Internal Revenue Manual provides, in pertinent part:

1218 **Policies of the Internal Revenue Service Handbook**

(6-5-89)

(1) All Service policy statements are contained in the Handbook, Policies of the Internal Revenue

Service, IRM 1218, numbered to correspond to the Manual Part to which the policy has principal application. However, the policy statements apply to all Service personnel and activities. * * * * * * *

P-2-7 (Approved 12-29-70) **Reasonable cause for late filing of return or failure to deposit or pay tax when due**

Any sound reason advanced by the taxpayer as the cause for delay in filing a return, making deposits under the Federal Tax Deposit System, or paying a tax when due, will be carefully analyzed to determine whether the applicable penalty should be asserted. Examples of sound causes for delay which, if established, will be accepted as reasonable cause are shown below.

(1) Death or serious illness of the taxpayer or a death or serious illness in his/her immediate family ....

(2) Unavoidable absence of the taxpayer ....

(3) Destruction by fire or other casualty of the taxpayer's place of business or business records. * * *

Other explanations may be acceptable

Acceptable explanations of delinquency are not limited to the examples given above, since any reason for delinquency in filing or making deposits or payments which establishe[s] that the taxpayer exercised ordinary business care and prudence but was nevertheless unable to comply within the prescribed time will be accepted as reasonable cause. * * * *

8.1.2.2.5 No Appeals Conference or Concession on Certain Arguments (9-15-98)

(1) As provided in Reg. 601.106(b), Statement of Procedural Rules, the administrative appeal procedures do not extend to cases involving solely the failure or refusal to comply with the tax laws because of moral, religious, political, constitutional, conscientious, or similar grounds. Such arguments will be given no weight in settlement.

120.1.1 Introduction [to the Penalties Handbook, IRM 120.1] and Penalty Relief (8-20-98)

120.1.1.2 Purpose of Penalties (8-20-98)

(1) Penalties exist to encourage voluntary compliance by supporting the standards of behavior expected by the Internal Revenue Service.

* * * *

120.1.1.2.1 Encouraging Voluntary Compliance (8-20-98)

* * * *

(4) Although penalties support and encourage voluntary compliance, they also serve to bring additional revenues into the Treasury, impose remedial charges against taxpayers, and indirectly fund enforcement costs. However, these results are not reasons for creating or imposing penalties.

* * * *

120.1.1.3.1 Reasonable Cause (8-20-98)

(1) Reasonable cause is based on all the facts and circumstances in each situation and allows the Service to provide relief for a penalty that would otherwise be assessed. Reasonable cause relief is generally granted when the taxpayer exercises ordinary business care and prudence in determining

their [sic] tax obligations but is unable to comply with those obligations.

* * * *

(3) Reasonable cause relief is not available for all penalties; however, other exceptions may apply.

1. For those penalties where reasonable cause can be considered, any reason which establishes that the taxpayer exercised ordinary business care and prudence, but was unable to comply with a prescribed duty within the prescribed time, will be considered.

* * * *

(5) Taxpayers have reasonable cause when their conduct justifies the nonassertion or abatement of a penalty. Each case must be judged individually on the facts and circumstances at hand. * * *

* * * *

120.1.1.3.1.1 Standards (8-20-98)

(1) Any reason that establishes a taxpayer exercised ordinary business care and prudence but was unable to comply with the tax law may be considered for penalty relief.

* * * *

120.1.1.3.1.2 Ordinary Business Care and Prudence (8-20-98)

(1) Ordinary business care and prudence includes making provision for business obligations to be met when reasonably foreseeable events occur. A taxpayer may establish reasonable cause by providing facts and circumstances showing the taxpayer exercised ordinary business care and prudence

(taking that degree of case that a reasonably prudent person would exercise), but nevertheless was unable to comply with the law.

* * * *

120.1.2 Chapter 2 - Failure to File/Failure to Pay Penalties (8-20-98)

120.1.2.1.3 Penalty Relief (8-20-98)

(1) IRM 120.1.1.3, [sic] provides guidance for determining if the taxpayer meets the criteria that will allow relief from a penalty. * * *

(2) The Service will not impose the FTF/FTP penalty when the taxpayer shows reasonable cause and not willful neglect for the failure to file a return or pay a tax as required.

1. Reasonable cause determinations MUST be made on the individual facts and circumstances of each case. IRM 120.1.1.3 provides guidance for determining if the taxpayer established reasonable cause.

* * * *

120.1.3 Chapter 3 - Estimated Tax Penalties

* * * *

120.1.3.4.1.4 Waiver Criteria Under IRC Section 6654(e)(3)(A) (8-20-98)

(1) For tax years beginning after December 31, 1983, IRC Section 6654(e)(3)(A) provides that the estimated tax penalty may be waived if the failure to make the estimated payment is due to casualty, disaster or other unusual circumstances such that the imposition of the penalty would be against equity and

good conscience. This is not equivalent to reasonable cause.

(2) For example, reliance on the advice of a competent tax advisor [sic] may constitute reasonable cause that would warrant relief from other penalties, but it does not provide a basis for a waiver of the estimated tax penalty under IRC section 6654(e)(3)(A).

* * * *

Supreme Court, U.S.
FILED
MAR 9 2000
CLERK

(2)

No. 99-1391

IN THE

Supreme Court of the United States

ROSA C. PACKARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK YEARLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS IN SUPPORT OF PETITIONER ROSA COVINGTON PACKARD

FREDERICK R. DETTMER
Counsel of Record
GEOFFRY D.C. BEST
LAW OFFICE OF
FREDERICK R. DETTMER
Attorneys for Amicus Curiae
New York Yearly Meeting of the
Religious Society of Friends
The Lincoln Building
60 East 42nd Street
Suite 1350
New York, New York 10165
(212) 599-5910

158342

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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BRIEF OF NEW YORK YEARLY MEETING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

New York Yearly Meeting of the Religious Society of Friends submits this brief, with the consent of the parties pursuant to Rule 37.2(a) of the Court's Rules, as a Friend of the Court in support of the petition for a writ of certiorari of Petitioner Rosa Covington Packard from the decision of the court below affirming the district court's grant of the motion to dismiss of Respondent United States of America. The letters expressing consent have been filed with the Clerk of the Court.[1]

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

New York Yearly Meeting of the Religious Society of Friends ("NYYM") is the umbrella organization for the Quaker Meetings in New York, part of Connecticut and northern New Jersey. Rosa Packard is a member of Purchase (New York) Friends Meeting, which is one of the Meetings within NYYM.

Rosa Packard's case reflects the Religious Society of Friends' long history of opposition to warfare in all forms and of advocacy of alternatives to violence for settling conflicts. Thus, on December 7, 1997, NYYM endorsed a minute supporting Rosa Packard's effort "to seek legal recognition for the reasonableness of her tax witness under the free exercise of religion clause of the First Amendment,"[2] and, on July 28, 1999, a minute was approved for NYYM to submit an *amicus* brief in support of Rosa Packard's petition for a writ of certiorari.[3]

---

1. This brief is not authored in whole or in part by counsel for either party, and no monetary contribution was made in support of its preparation or submission by any person or entity other than *amicus* and its counsel.

2. NYYM, *Yearbook 1998: Proceedings and Appointments*, Minute # 27, at 7-8 (pub. Nov. 1998).

3. NYYM, *Yearbook 1999: Proceedings and Appointments*, Minute # 32, at 118 (pub. Nov. 1999).

A. Peace Testimony

We live in a culture so inured to violence that the quiet voice of peace scarcely can be discerned. From candy named "War Heads" to missiles called "Peacemakers", we are daily inundated by glorification of violence and distortion of the true nature of violence. Under these circumstances, the long history of Friends' peace testimony tends to be overlooked. The Quaker peace testimony significantly contributed to the development of the nation's self-conception and maintains an influential place in the national ethos.[4] Some of that history is described in Point I, *below*.

B. Accommodation

This Court has instructed that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990), *quoting Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality). The petition of Rosa Packard amply demonstrates that the Internal Revenue Service interprets its regulations at issue here to support a flexible system of individual exemptions. Yet, in reliance on the presumption of burden for tax matters supposedly embedded in *United States v. Lee*, 455 U.S. 252 (1982), the courts below refused to consider whether the IRS's refusal to "extend that system to cases of religious hardship" like Rosa Packard's offends the First Amendment's Free Exercise Clause or the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*

The confluence of *Smith* and *Lee* appears to have created a jurisprudence in which the exercise of religious conscience will be accommodated in matters involving taxation only if

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4. *See* John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (Univ. Calif. Press 1998) (hereinafter cited as "*Noonan*"), at 51-54, 72-74, 89-91, 222; *City of Boerne v. Flores*, 521 U.S. 507, 557-560 (1997) (O'Connor, J., dissenting).

convenient, even in statutes or regulations providing a system of dispensations for business and other excuses. Such a rule of law flies in the face of the First Amendment's guarantee of the free exercise of religion and may cause persons of good faith to disengage from civil society.

The long history of multifaceted governmental accommodation of Friends' practices reflects the profound respect for acts of religious conscience embodied in the First Amendment's Free Exercise of Religion Clause. Because they entail modification of rules or requirements of general application, requests for accommodation always appear burdensome or unmanageable to the magistrate or administrator saddled with responsibility for executing a law. *See, e.g., Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972) (Determining that accommodating religious objection to participation in mandatory high school ROTC program would not unduly burden school board and officials). Those fears were sufficiently troubling to the district court to prompt it to declare that accommodating Rosa Packard's tax witness "would be opening Pandora's Box", would create "an impractical and unworkable system" and would be "cumbersome". *Packard v. United States*, 7 F. Supp. 2d 143, 146, 147, Pet. App. B8, B9 (D. Conn. 1998).

The history of governmental acknowledgment of Quaker testimonies and witness, however, demonstrates that requests for accommodation of religious conscience should be afforded careful consideration before being rejected on the basis of inchoate fears of pandemonium or burden, and the Religious Freedom Restoration Act's mandate to allow exceptions for religious objectors unless the government demonstrates that it has utilized "the least restrictive means"[5] would appear to compel such a detailed analysis. Some of that history of accommodation is summarized in Point II, *below*.

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5. 42 U.S.C. § 2000bb-1(b)(2).

C. Process

Quaker practice shares with the American judicial system belief in, and reliance upon, process — faith in the force of reason and reasoning together — to assure correct and legitimate outcomes on a case-by-case basis. The apparent unwillingness or failure of the courts below to provide a discerning and particularized consideration of the merits of Rosa Packard's claim, as detailed in her petition, is a matter of great concern to Quakers because it suggests a governmental bias against religious conscience. *Cf. Cassius Marsellus Clay, Jr. v. United States*, 403 U.S. 698 (1971) (Conscientious objector determinations must be made on an individualized basis and not through application of a presumption or "rule of law" as to applicant's religious sincerity). As Judge John T. Noonan explains in discussing James Madison and the intent of the Religion Clauses:

> The radicalness of JM — should we say the madness of Madison? — was to suppose that each individual has a zone in which he or she responds to the voice of God, a zone beyond political authority. . . . A's conscience might lead to refusal to cooperate in the common defense of the community (Mr. Madison was well aware of his conscientious-objector constituents). JM was willing to run these risks without discussing them, confident, I suggest, that the difficult cases would be rare and de minimis — confident, after all, that the voice of God would not often be heard in distorted or eccentric ways. . . .
>
> In the ultimate and absolute relation of each individual to God lies the limitation on civil society and civil government on which JM insists. Without that relation, why should the individual not be absorbed by the community, why should a society be constrained to respect conscience? With that

> relation to a Creator, Governor, Judge in existence for each individual, with that personal responsibility to a personal God, a government of human beings must be a government of limited powers.[6]

Modern Constitutional analysis, particularly as to the Religion Clauses, frequently employs a substantial historical review to discern the probable intent of the Founding Fathers. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). In this spirit, the discussion below highlights: (i) the history and religious character of the Society of Friends' opposition to warfare, including Friends' peace tax witness; and (ii) the long history of governmental acknowledgment of Friends' practices and beliefs in recognition of the mandate of the First Amendment's Free Exercise of Religion Clause.

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6. *Noonan* at 89. Judge Noonan goes on to identify "Ten Commandments" for the proper relationship of government to religion, the Ninth of which states:

> *Ninth.* You shall recognize that the free exercise of religion can be divisive and dangerous to established institutions and customary ways as well as beneficent for believers and empowering for the forgotten, and that the price of our constitutional liberty is acceptance of this precarious condition.

Noonan at 358.

ARGUMENT

I.

THE QUAKER PEACE TESTIMONY.

> We do utterly deny all outward wars and strife and fightings with outward weapons, for any end or under any pretense whatsoever. And this is our testimony to the whole world. . . . [T]he spirit of Christ, which leads us into all Truth, will never more move us to fight and war against any man with outward weapons, neither for the Kingdom of Christ, nor for Kingdoms of this world.[7]

Quakers are well known for their unyielding religious conviction that attention to the Inner Light, present in every person, empowers all of us to resolve disputes **without** resort to the machinery of war. This conviction results in Friends' stand against warfare in all forms.[8]

A. Origins of the Quaker Peace Testimony.

The Religious Society of Friends was born during the era of violent revolution and counter-revolution in seventeenth-century England. The times compelled the early Friends immediately to confront their faith in the Inner Light of every person in response to demands that they participate in these British wars.

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7. Declaration "Against All Plotters and Fighters in the World" addressed to Charles II by George Fox, Richard Hubberthorne and ten other Friends, January 21, 1661; *quoted* in *The Journal of George Fox*, John L. Nickalls, ed. (London: Cambridge Univ. Press 1952), at 399-400; *see also* Peter Brock, *The Quaker Peace Testimony 1660 to 1914* (Sessions Book Trust, York, England 1990) (hereinafter cited as "*Brock*"), at 25.

8. Nonetheless, the district court dismissed Rosa Packard's act of religious conscience by casting it together with acts grounded in "philosophical, moral or other reasons". *Packard v. United States*, 7 F. Supp. 2d at 145, 146-47, Pet. App. B5, B8.

With the restoration of the British monarchy in 1660, the peace testimony was first formally articulated in the official Declaration delivered to Charles II in January 1661 (quoted at the start of this section).[9] From this date on, the peace testimony has been an integral and distinctive feature of Friends' beliefs and practices, distinguishing the Society of Friends from nearly all other religious groups and calling Quakers to personal witness and testimony to support the end of warfare and the promotion of nonviolent alternatives for resolving disputes. This is reflected in Advice # 14 of NYYM's *Faith and Practice* (1998 ed.) (at 60-61) (emphasis added):

> Friends are earnestly cautioned against the taking of arms against any person, since "all outward wars and strife and fightings with outward weapons" are contrary to our Christian testimony. **Friends should beware of supporting preparations for war even indirectly, and should examine in this light such matters as** non-combatant military service, cooperation with conscription, employment or investment in war industries, and **voluntary payment of war taxes**.

B. Expressions of the Peace Testimony.

Friends seek to make real their faith and concerns through personal acts ("witness and testimony"). As a core Quaker belief, the peace testimony has been expressed in a multitude of ways including: (i) the refusal to pay taxes used to support military objectives; (ii) refusal to participate in military service; and (iii) acting to prevent warfare and providing humanitarian aid in times of war.

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9. Shortly thereafter the Quaker peace testimony and witness, together with other Friends' principles and practices, were systematically articulated by Robert Barclay in his *An Apology for the True Christian Divinity*, first published in Latin in 1676 and in English in 1678. *See Brock* at 27-29.

1. Refusal To Pay War Taxes.

One expression of the peace testimony is the refusal to pay taxes levied for military purposes. Friends have long been concerned by the inconsistency of helping to finance a war effort, while refusing to participate in warfare. For at least two hundred years, this concern has led various Friends to decline to support preparations for warfare and the machinery of war.[10]

For example, in 1755, while the Pennsylvania Assembly was debating raising funds "for the king's use" in the French and Indian War, a delegation of 20 Quakers addressed the Assembly in opposition to the raising of money for the war. They warned that "many among us will be under the necessity of suffering rather than consenting thereto by the payment of a tax for such purposes".[11]

When the bill became law, these Friends published "An Epistle of Tender Love and Caution to Friends in Pennsylvania" to explain the basis for this testimony and to encourage others to follow their faith in refusing to contribute to war taxes:

> [W]e therefore think that as we cannot be concerned in wars and fightings, so neither ought we to contribute thereto by paying the tax directed by the said Act.[12]

Quakers expressed comparable positions in opposition to taxation for military purposes during virtually every American conflict from the Revolutionary War to the present.[13]

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10. *See Brock* at 184-196.

11. *Brock* at 117.

12. *The Journal and Major Essays of John Woolman*, Phillips P. Moulton, ed. (New York 1971), at 85-86; *quoted* and discussed in *Brock* at 118.

13. *See Brock* at 190-196; *Noonan* at 222-225.

Quaker organizations also have sought to support individual refusals to pay taxes destined for military purposes. Many Friends and Quaker organizations, including New York Yearly Meeting, refused to pay the federal telephone tax imposed to help finance the Vietnam War.[14] Similarly, New York Yearly Meeting and its constituents, Purchase Quarterly Meeting and Purchase Monthly Meeting, have long actively supported the peace tax testimony in general and the leading of Rosa Packard in this case. Nearly 30 years ago, NYYM adopted Minutes supporting resistance to war taxes and creating a procedure for assisting its employees who declined voluntarily to pay taxes allocable to military purposes.[15] In February 1991, Purchase Quarterly Meeting established the Peace Tax Escrow Fund utilized by Rosa Packard and continues to administer the Fund for the tax witness of her and others. *See* Complaint at ¶¶ 14-15, 36 (JA 7a, 12a). Purchase Monthly Meeting regularly records the amount of interest and penalties seized from Rosa Packard, which is the subject of this action, as a "minute of suffering for religious conscience". And New York Yearly Meeting, in addition to authorizing and preparing this and a previous *amicus* brief, has similarly recorded its support of her witness.

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14. *Quaker Crosscurrents: 300 Years of Friends in the New York Yearly Meetings*, Hugh Barbour, ed. (Syracuse Univ. Press 1995) (hereinafter cited as "*Quaker Crosscurrents*"), at 313.

15. *Minutes and Proceedings of the 276th/277th Sessions of New York Yearly Meeting of the Religious Society of Friends*, Minute # 117, at 23, & Minute # 20, at 73 (July 25-August 1, 1971 & July 30-August 6, 1972).

Similar actions were taken by the American Friends Service Committee and Philadelphia Yearly Meeting. *See American Friends Service Committee v. United States*, 368 F. Supp. 1176 (E.D. Pa. 1973), *rev'd on procedural grounds*, 419 U.S. 7 (1974) (per curiam); *United States v. Philadelphia Yearly Meeting*, 753 F. Supp. 1300 (E.D. Pa. 1990).

2. Other Expressions of the Peace Testimony.

Friends' belief that no human being can rightly be deemed an enemy is most commonly reflected in efforts to aid those caught in the horrors of violence and to seek alternatives to violence for the resolution of disputes and differences. For example, as they have done in numerous violent conflicts over three centuries, Friends acted to provide medical supplies and other relief assistance to all sides in the Vietnam War and during the more recent struggles in Bosnia and Rwanda. The Friends Committee on National Legislation in Washington and the Quaker United Nations Offices in New York and Geneva work actively with Congress and the United Nations to develop alternatives to force and coercion in national and international affairs.[16] Other well-known Quaker organizations which seek to pursue and promote non-violent alternatives for the resolution of disputes include the American Friends Service Committee, the Alternatives to Violence Project and Friends Peace Team Project.

The peace testimony also finds expression in Friends' work to relieve or overcome poverty, injustice, and other forms of suffering, which are among the causes of war.[17] It was work of this sort that was the primary basis for the award of the Nobel Peace Prize to the Religious Society of Friends in 1947.[18]

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16. *Quaker Crosscurrents* at 253, 281, 304-307, 312.

17. *See, e.g.*, Hans A. Schmitt, *Quakers & Nazis: Inner Light in Outer Darkness* (Univ. of Missouri Press 1997).

18. D. Elton Trueblood, *The People Called Quakers* (1966), at 257. Other examples include the International Peace Research Association, which was founded by Quakers Kenneth and Elise Boulding, and VISA and VISTA, which are modeled on earlier Quaker youth work camp programs. *See Quaker Crosscurrents* at 295.

C. Conclusion.

All the expressions of the peace testimony find their inspiration in the conviction that the spirit of God dwells in each person, and that the calling of Friends is to listen and speak to that of God in others, thereby strengthening that of God within themselves. There are, of course, conflicts and disputes, and we all must struggle with evil. But in such struggles, Friends' only weapons are love, gentleness, faith, patience, purity, grace, virtue, temperance, self-denial, meekness and innocence. Petitioner Rosa Packard's peace witness profoundly reflects these core Quaker religious beliefs.

II.

HISTORY OF GOVERNMENTAL ACKNOWLEDGMENT OF QUAKER TESTIMONIES.

The lengthy history of governmental recognition of Quaker testimonies and witness, which began in the pre-Revolutionary era, includes accommodation of Friends' peace testimony and exemption from paying certain taxes, as well as respect for, and accommodation of, other Quaker beliefs and practices.

A. Accommodation of Friends' Peace Testimony.

Quaker opposition to military service was recognized and accommodated even during the American Colonial and Revolutionary War eras, and exemptions from military service on religious conscience grounds have been continued to the present.

By the middle of the eighteenth century, the absolute refusal of Quakers to fight was so familiar that at least five colonies — New York, Virginia, Massachusetts, North Carolina and Rhode Island — allowed Quakers to be exempted from the military service obligatory for other able-bodied males. (Pennsylvania, more heavily Quaker, did not even adopt a military conscription act until 1775.)[19]

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19. *Brock* at 48; *see, e.g.*, The Colonial Laws of New York, Vol. III, at 1068-70.

During the Revolutionary War, both the Continental Congress and colonial governments afforded exemption from military service for Quakers and other religious conscientious objectors.[20] These exemptions generally were continued by state governments until the demise of the state militia system in the 1850's.[21]

Conscientious objection to military service has also long received Federal governmental recognition.[22] With the Civil War came the first federal universal military service draft. In March 1863 and February 1864, Congress adopted acts exempting from service "members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations. . . ."[23] Every subsequent draft law has included exemptions for persons whose religious conscience precluded their accepting military service.[24] And conscientious objection has continued to be an important expression of the peace testimony by Quakers in the United States.[25]

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20. *Brock* at 146-147; *see, e.g.*, Sessions Laws of the State of New York: 1777-1784, Vol. I, at 49.

21. *Brock* at 156-157; *see, e.g.*, Revised Statutes of the State of New York (1829), Vol. I, at 286, 317.

22. Indeed, James Madison proposed including a clause exempting conscientious objectors in the Bill of Rights. *See Brock* at 156.

23. *See Brock* at 169. These acts generally required the provision of some alternative civilian service or the payment of a commutation or substitution fee.

24. *See, e.g., United States v. Seeger*, 380 U.S. 163, 170-171 (1965); *United States v. Geary*, 368 F.2d 144, 147-148 (2d Cir. 1966); Military Selective Service Act, § 6(j), 50 U.S.C. (App.) § 456(j); *Noonan* at 222-225.

25. *See, e.g., Brock* at 142-183 & 290-298.

B. Exemptions From Paying Taxes.

While accommodation of Quaker objections to the payment of certain taxes has been complicated because most taxation programs are general revenue raising measures, rather than dedicated to particular uses, there are, nonetheless, significant examples of such governmental accommodations.

During the Civil War, Congress specifically accommodated Quaker conscientious objections to the payment of "war taxes" by providing that the commutation fee to be paid for exemption from military service was to be applied solely to humanitarian purposes.[26]

C. Accommodations of Other Quaker Practices.

Quakers believe in a single standard of truth and, therefore, decline to swear oaths.[27] During the Colonial period, governments accommodated this belief by permitting persons of "Tender Conscience" to testify without taking an oath.[28] Following the Revolutionary War, these types of statutes typically were adopted by various states[29] and have

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26. *See Brock* at 169-170. The Act provided that conscientious objectors who chose not to perform noncombatant military service "shall pay the sum of three hundred dollars . . . to be applied to the benefit of the sick and wounded soldiers." Act of Feb. 24, 1864, § 17, 38th Cong., 1st Sess., ch. XIII, 13 Stat. 6, 9.

27. New York Yearly Meeting of the Religious Society of Friends, *Discipline of the Yearly Meeting of Friends* (New York: Collins & Perkins 1810), at 47-48; New York Yearly Meeting of the Religious Society of Friends, *Faith and Practice* (1998 ed.) at 23, and Advice # 13 at 60.

28. *See, e.g.*, Colonial Laws of New York, Vol. I, at 257-58 and Vol. II, at 828-30.

29. For example, New York State in 1787 renewed the right of Quakers to affirm rather than swear. Sessions Laws of the State of New York: 1785-1788, Vol II, at 410-11. In 1798, New York extended

(Cont'd)

been continued in current federal and state laws.[30] Since oaths had been necessary for voting, these laws also had the effect of enfranchising Quakers.[31]

State laws also have long accommodated: (i) Friends' marriage practices, typically requiring only that those "marriages may respectively continue to be solemnized in the manner, and agreeably to the regulations, of their respective societies";[32] and (ii) Quaker manumissions of slaves, which frequently were not done in accordance with statutory requirements (where permitted at all).[33]

(Cont'd)
the right to affirm to "Shaking Quakers" (Shakers) and the "Universal Friends". Sessions Laws of the State of New York: 1797-1800, Vol. IV, at 214.

30. *See, e.g.*, 28 U.S.C. § 1746; Federal Rules of Evidence, Rule 603; Federal Rules of Civil Procedure, Rule 43(d); 7B McKinney's, New York Civil Practice Laws and Rules § 2309(b). *See also* United States Constitution, Art. I, § 3, cl. 6; Art. II, § 1, cl. 3; Art. VI, cl. 3.

31. Arthur J. Worrall, *Quakers in the Colonial Northeast* (Hanover, New Hampshire and London: Univ. Press of New England 1980), at 109-110.

32. The Revised Statutes of the State of New York (1829), Vol. II, at 141. Current New York law continues the exemption "among the people called friends or quakers". 14 McKinney's, New York Domestic Relations Law § 12.

33. For example, New York State Law specifically recognized Quaker manumissions of slaves, though they had not been always made "in strict conformity to the statutes". Sessions Laws of the State of New York: 1797-1800, Vol. IV, at 168.

CONCLUSION

During the Civil War, the Federal Government accommodated the Quaker peace testimony by allocating conscientious objectors' commutation fees to humanitarian purposes without suffering undue burden. Similarly, today the Internal Revenue Service is able to administer the voluntary $3.00 campaign finance check-off without disrupting our tax system. In light of these examples, surely Rosa Packard's act of religious conscience deserves a discerning consideration before determining that accommodation by providing her relief from discretionary penalties is not required by the First Amendment or the Religious Freedom Restoration Act.

For all the foregoing reasons, together with those set forth in the petition of Petitioner Rosa Covington Packard, *Amicus Curiae* New York Yearly Meeting of the Religious Society of Friends urges the Court to grant the petition for a writ of certiorari.

Dated: March 9, 2000

Respectfully submitted,

FREDERICK R. DETTMER
Counsel of Record
GEOFFRY D.C. BEST
LAW OFFICE OF
FREDERICK R. DETTMER
Attorneys for Amicus Curiae
New York Yearly Meeting of the
Religious Society of Friends
The Lincoln Building
60 East 42nd Street
Suite 1350
New York, New York 10165
(212) 599-5910

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(3)

No. 99-1391

In the Supreme Court of the United States

ROSA COVINGTON PACKARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

PAULA M. JUNGHANS
Acting Assistant Attorney General

GILBERT S. ROTHENBERG
MICHELLE B. O'CONNOR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the imposition of federal income taxes, penalties and interest on petitioner violates the Free Exercise Clause of the First Amendment to the United States Constitution or the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

In the Supreme Court of the United States

No. 99-1391

ROSA COVINGTON PACKARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 198 F.3d 234 (Table). The opinion of the district court (Pet. App. B1-B9) is reported at 7 F. Supp. 2d 143.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1999. The petition for rehearing was denied on November 19, 1999 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on February 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Petitioner is a member of the Religious Society of Friends, commonly known as the Quakers, who sincerely believes that participation in war is contrary to God's will (Pet. App. B1, B3; R. 1, at 1, 3). [1] Petitioner also believes that a "voluntary" payment of taxes—one made without the compulsion of a court order—is against the will of God to the extent that such taxes are used to fund participation in war by others (Pet. App. B3; R. 1, at 3).

Although petitioner timely filed federal income tax returns for the years 1992 and 1993, petitioner did not pay any of the taxes shown due on those returns. Instead, she deposited the taxes in an escrow fund with instructions for the monies not to be paid to the IRS unless the government first agreed to spend the monies only on nonmilitary items. R. 1, at 4, 8, 12.

2. The United States collected petitioner's unpaid taxes for the years 1992 and 1993 by levy (Pet. App. B1-B2). The government also collected interest on the unpaid taxes and statutory additions to tax for failure to timely pay taxes (26 U.S.C. 6651(a)(2)) and for underpayment of estimated taxes (26 U.S.C. 6654). After petitioner's administrative claims for refund were denied, petitioner commenced this refund suit in federal district court.

Petitioner did not dispute her liability for the taxes collected by the government. She contended, however, that she was not liable for the asserted additions to tax under 26 U.S.C. 6651(a)(2) because she had "reasonable cause" for her failure to timely pay her taxes (Pet. App.

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[1] "R." references are to the documents contained in the original record, as numbered by the clerk of the district court.

B5). She also claimed that, even if she did not literally come within the terms of the statutory exceptions to the penalties under 26 U.S.C. 6651(a)(2), the government's refusal to grant her an exemption from additions to tax constituted an impermissible discrimination against her religious beliefs in violation of the Free Exercise Clause of the First Amendment (Pet. App. B5). She further asserted that a requirement that she voluntarily pay her taxes, or be liable for penalties for a failure to do so, violated the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* She claimed that a less intrusive means of furthering the government's compelling interest in collecting taxes than imposing penalties for noncompliance should be required to comply with that Act (Pet. App. B6).

3. The district court granted judgment on the pleadings to the United States (Pet. App. B1-B9), and the court of appeals affirmed (*id.* at A1-A2). The court of appeals noted that the contentions raised by petitioner in this case had recently been addressed and rejected in that circuit in *Browne* v. *United States*, 176 F.3d 25 (2d Cir. 1999), cert. denied, 120 S. Ct. 934 (2000), and by the Third Circuit in *Adams* v. *Commissioner*, 170 F.3d 173 (1999), cert. denied, 120 S. Ct. 937 (2000). For the reasons stated in those decisions, the court of appeals concluded that petitioner's claims in this case were "without merit" (Pet. App. A2).

ARGUMENT

This case presents the same questions presented in the petitions for a writ of certiorari in *Browne* v. *United States*, *supra*, and *Adams* v. *Commissioner*, *supra*, which this Court has denied. For the same reasons that the Court denied the petitions in *Browne* and *Adams*, and for the reasons detailed in our brief in opposition in

Browne, the petition for a writ of certiorari should be denied in this case.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

PAULA M. JUNGHANS
Acting Assistant Attorney General

GILBERT S. ROTHENBERG
MICHELLE B. O'CONNOR
Attorneys

MARCH 2000

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[2] We are providing herewith to petitioner a copy of the government's brief in opposition to the petition in *Browne*.

Supreme Court, U.S.
FILED
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(4)

No. 99-1391

IN THE
SUPREME COURT OF THE UNITED STATES

ROSA COVINGTON PACKARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

PETER GOLDBERGER
Counsel of Record
JAMES H. FELDMAN, JR.
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

Attorneys for Petitioner

March 2000

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ARGUMENT IN REPLY

ROSA COVINGTON PACKARD has petitioned this Court for a writ of certiorari to review the order of the Second Circuit denying her appeal from a Connecticut district court decision in a tax refund action. The decision below upheld an order dismissing petitioner's civil complaint under Fed.R.Civ.P. 12(b)(6). The complaint had sought a refund of certain penalties only -- not of taxes or of interest -- for late payment of income taxes and for failure to make quarterly estimated payments. The lateness resulted solely from petitioner's inability to pay voluntarily, an exercise of her Quaker religious convictions against paying for military activities and war preparation.

In support of her petition, petitioner gave two reasons why certiorari should be granted: (1) to enforce the language of the Religious Freedom Restoration Act and uphold the Congressional policy that federal government agencies must meet a statutory burden of pleading and proof under the "least restrictive means" test before unnecessarily burdening the exercise of sincere religious beliefs -- a burden which the statute plainly makes an affirmative defense, and therefore one which cannot be asserted by motion under Rule 12(b)(6), and (2) to correct the lower courts' departure from this Court's settled precedent under the Free Exercise Clause, which bars disadvantageous treatment of religious reasons where a government agency has been granted discretion to allow exemption from penalties for "good" or "reasonable" cause.

Rather than address forthrightly the reasons presented by the petitioner, the respondent claims that

"[t]his case presents the same questions presented in the petitions for writ of certiorari in *Browne v. United States*, [*cert. denied*, 120 S.Ct. 934 (2000) (No. 99-632)], and *Adams v. Commissioner*, [*cert. denied*, 120 S.Ct. 937 (2000) (No. 99-798).]" Brief in Opposition ("BO") at 3. Respondent then argues that the writ should be denied "[f]or the same reasons that the Court denied the petitions in *Browne* and *Adams*, and for the reasons detailed in our brief in opposition in *Browne* ...." *Id.* at 3-4. Of course, the respondent does not know the "reasons that the Court denied the petitions in" those other cases, as no reasons were announced, so it is impossible to respond to that argument. And most of the contentions presented in opposition to the *Browne* petition were inapposite to this case, partly because of factual and procedural differences which the respondent either overlooks or affirmatively misrepresents. The brief in opposition is therefore entirely unpersuasive.

1. Although the instant case does present one of the issues raised in *Browne* (the First Amendment equal treatment issue), it does not present the other issue advanced in that case. While the petitioners in *Browne* and the petitioner in this case have argued that the Internal Revenue Service's failure to abate various penalties violates both the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA") as well as the First Amendment's Free Exercise Clause, the reasons that each petitioner gave for why a writ of certiorari should be granted, as well as factual and procedural differences in the cases, render much of the respondent's opposition in *Browne* inapplicable to this case.

To enhance its position that this case should not be considered on its own merits, the respondent also

restates the Questions Presented in the same terms that it used to oppose the *Browne* petition. That tactic is not inherently improper, so long as the recast question is really a fair statement of the issue or issues in the case. But in this instance it is not. The Questions stated in Ms. Packard's petition are a carefully and accurately framed presentation of the issues that this Court might want to address in the case. The respondent's counterstatement is not only inapposite,[1] but also entirely obscures the legal points presented.

This case does not arise out of an order granting "judgment on the pleadings," as critically misstated by the respondent. BO 3.[2] If it did, the procedural issue which the petition presents first would not arise. A motion to dismiss under Rule 12(b)(6) is not the same as a motion for judgment on the pleadings under Rule 12(c). *Browne* was in fact a 12(c) case; the instant case is not. Thus, the respondent's counterstatement of the Question

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[1] In particular, Ms. Packard's petition does not challenge either "the imposition of federal income taxes" or of "interest." BO i. Her petition quite clearly and specifically *only* challenges the imposition of certain civil penalties, as a careful reading even of the Brief in Opposition reveals.

[2] While conceding the sincerity and religious nature of petitioner's beliefs which underlie her inability to comply without some accommodation, BO 2, respondent nevertheless also misstates the nature of petitioner's objection. Petitioner has never described her inability to pay "voluntarily" as an objection to payments made "without the compulsion of a court order." BO 2. To petitioner, a court order would be no different from a legislative command. Petitioner's religious beliefs prevent her from writing the check if the proceeds would be used for military purposes.

Presented is not accurate, honest, or fair. The first question in the case is precisely the procedural issue stated by petitioner:

> Under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, is the government's asserted inability to further its compelling interest by any means less restrictive of the plaintiff's religious liberty an affirmative defense to be pleaded under Fed.R.Civ.P. 8(c), or may a court grant a Rule 12(b)(6) motion to dismiss the complaint on the unproven basis that the plaintiff's objection, by virtue of being religious in nature, cannot be accommodated?

Petition, at i. Because the *Browne* case was not decided in the district court under Rule 12(b)(6), the petition in that case did not advance any of the arguments interrelating the statutory language of RFRA with the operation of the Federal Rules of Civil Procedure that are advanced in Ms. Packard's petition as arguments for granting certiorari. For these reasons, the respondent's Brief in Opposition misses the mark.

In its *Browne* filing, adopted by the brief in opposition here, the respondent argued that the "decision of the court of appeals [in that case] is correct and does not conflict with any decision of this Court or any other court of appeals." *Browne* BO 5. See also *Browne* BO 11-12 (discussing conflict claim made in *Browne* petition). Unlike the petitioners in *Browne*, however, the petitioner in this case has made no claim that the decision of the court below conflicts with the decision of any other court of appeals. Her principal arguments demonstrating conflict with this Court's decisions -- focusing on such

12(b)(6) cases as *Gomez v. Toledo*, 446 U.S. 635 (1980) (burden of pleading), and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 2143 (1999) (obligation to base decision on facts as pleaded) -- remain unanswered, because the Rule 12(b)(6) issue did not arise in *Browne*.

The respondent argued in *Browne* that because pre-*Smith* cases uniformly rejected Free Exercise claims in tax cases, the court of appeals correctly rejected those petitioners' RFRA claim. *Browne* BO 9-10. By adoption of that brief, respondent argues the same here. While the legislative history of RFRA suggests that courts may sometimes look to pre-*Smith* precedent for guidance, the respondent's reference to cases which fail to follow the procedures and standards mandated by RFRA can provide no guidance at all. See *Browne* BO 10-11.[3]

As this Court has acknowledged in *Smith*, such decisions as *United States v. Lee*, 455 U.S. 252 (1982), only "purported" to apply the *Sherbert* test. 494 U.S. at

[3] The respondent claims, in particular, that these cases demonstrate a settled body of precedent rejecting Free Exercise challenges to the imposition of tax penalties. *Browne* BO 11. In fact, none of these cases raised any of the issues presented by our petition. Only one (*Nelson v. United States*, 796 F.2d 164 (6th Cir. 1986), mis-cited by the respondent) even discusses the statutory basis for abatement of penalties. And *Nelson* is a "frivolous return" case under 26 U.S.C. § 6702, which does not have a "reasonable cause" or "exceptional circumstances" exemption. Moreover, at least one thoughtful district court opinion, applying the test later adopted by Congress in RFRA, did rule in favor of Quaker objectors to voluntary income tax payment. See *American Friends Service Committee v. United States*, 368 F.Supp. 1176 (E.D.Pa. 1973), *rev'd on other grnds.*, 419 U.S. 7 (1974) (per curiam).

883.[4] If courts are permitted to decide RFRA cases by following court opinions which only "purport" to apply the *Sherbert* test, but which in fact do not, then only lip-service will be paid to the accommodations to free religious exercise which Congress has mandated. Only pre-*Smith* cases which apply *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) -- the cases specifically referenced in 42 U.S.C. § 2000bb(b)(1)-- according to their terms and their spirit can properly provide guidance in decisions under RFRA. Moreover, RFRA assigns a specific burden of proof by "evidence," *id.* § 2000bb-2(3) -- an enhancement to the *Sherbert* test, as Judge Noonan has pointed out. See *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996).

By relying exclusively on the *Browne* opposition, respondent ignores the district court's improper invocation of Rule 12(b)(6), which excused the government from offering any evidence to support its purely rhetorical contention that no accommodation is feasible.

2. Respondent's restatement of the questions presented also implies that the First Amendment issue in this case -- an argument for proper construction of the

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[4] The other cases cited by the respondent fare little better. *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989), provides no guidance in RFRA cases, because it also did not require the government to *demonstrate* with evidence the truth of its assertion that the tax system could not survive recognition of religious exceptions. None of the pre-*Smith* cases cited by respondent as approving the imposition of penalties for failing to comply with the tax laws for religious reasons even "purports" to apply a *Sherbert*-type analysis to a claimed exemption from penalties imposed for failure to file or pay taxes (including estimated taxes). *Browne* BO 11.

tax penalty statutes, not an argument that those statutes are unconstitutional -- is something other than what it is. The real question on the merits is stated by petitioner:

> In light of the Free Exercise Clause, does a civil complaint for a refund of tax penalties state a claim on which relief can be granted by averring that the IRS categorically denies statutorily authorized penalty waivers to applicants whose religious convictions, if not accommodated, prevent them from voluntarily making timely payment of income tax, even though the IRS generally gives individualized consideration to taxpayers who allege that circumstances beyond their control impeded timely payment?

The respondent argued in opposition to the *Browne* petition that the petitioners in that case "failed to establish reasonable cause .... Their complaint did not allege that they exercised ordinary business care, that they were unable to pay the taxes, or that undue financial hardship would result from timely paying the taxes in question." *Browne* BO 6. This argument, although adopted by respondent as a reason to deny certiorari in this case, is inapplicable to petitioner Packard.

First, petitioner Packard did allege that she exercised "ordinary business care," as defined in the IRS's own regulation, by placing the full amount of unpaid tax in escrow. Thus, unlike the Brownes, she was entitled to a penalty abatement under the plain language of 26 C.F.R. § 301.6651-1(c)(1) (Appx. D6), *see* Pet. 25, and was denied it solely because her impetus was religious in nature, as expressly provided in another IRS regulation.

Id. § 601.106(b) (Appx. D7); *see* Pet. 26. A more blatant violation of the equal-treatment doctrine under the Free Exercise Clause, as interpreted in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality), and *Employment Division v. Smith*, 494 U.S. 872, 886 (1990), could hardly be imagined.

Second, it is irrelevant whether "undue financial hardship would result from timely paying the taxes in question," because the regulation requires only "undue hardship" -- the insertion of "financial" into the criterion is an invention of respondent's counsel. *See* Pet. 25-26; Appx. D3, D5. The respondent's demand that the "hardship" be financial and not religious in nature is simply another manifestation of its disregard of the *Sherbert/Roy/Smith* principle.

The respondent also argued in *Browne* that the determination of the petitioners in that case not to pay federal income taxes did not have a "reasonable cause," because a "decision not to pay taxes that is based on a religious or other belief is not '[a] factor[] beyond the taxpayer's power to control.'" *Browne* BO 7 (bracketed insertions as in original). This argument is not persuasive. The respondent's refusal to acknowledge how religious beliefs involve forces beyond the control or understanding of human beings is unsupported by case law, evidence, human experience, or logic. *Browne* BO at 7; *see also* cases cited and discussion in Petition, at 28 n.16; Amicus Brief of New York Yearly Meeting of Religious Society of Friends, *passim* (discussing long history of Quaker obedience to demands of faith, and of American governments' accommodations of Friends' objections). Moreover, the complaint in this case, which must be accepted as true for present purposes, alleged

that petitioner's beliefs actually "prevent" her from paying voluntarily. *See* Pet. 27-28.

Next, the respondent argued in *Browne* that "the Free Exercise Clause does *not* require the United States to grant an exemption for religious hardship when, as here, waivers are granted on the basis of facially neutral, uniformly applicable standards that do not take into account religious or other beliefs." *Browne* BO 7 (emphasis original). As fully elaborated in the petition in this case, however, Congress' decision to grant exemptions to the failure-to-pay penalty for "reasonable cause," App. D1, and to the failure to pay estimated tax penalty for "unusual circumstances" which render its imposition "against equity and good conscience," App. D2, are precisely the individualized type of exemptions which this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), said may not exclude "religious hardship" without "compelling reason." *Id.* at 884. *See* Pet. 22-29.

Although the adopted brief in opposition claimed that exemptions are available "only upon the occurrence of specific circumstances beyond the individual's control," *Browne* BO 8, the respondent's own published policy belies that assertion. The Internal Revenue Manual provides that:

> Any sound reason advanced by the taxpayer as the cause for delay in ... paying a tax when due ... will be carefully analyzed to determine whether the applicable penalty should be asserted.

IRM 1218, IRS Policy P-2-7 (App. D9); *see generally* Pet. 26-27 & App. D8-D12. The Internal Revenue Manual lists as "examples of sound causes" a "death or serious illness" in the taxpayer's immediate family. App. D9.

The taxpayer's own death or illness might make compliance impossible, but a taxpayer's attention to a relative's death or illness only reflects a matter of making a pressing but voluntary decision among priorities. The respondent's claim that religious exercise involves only free choice, and that voluntary choices never constitute "reasonable cause" is belied by examples such as this. The respondent's argument merely serves to justify the kind of discriminatory exclusion of religious reasons that RFRA and the Free Exercise Clause prohibit.

This Court should grant certiorari to require courts to apply RFRA according to its terms to all federal agencies, including the Internal Revenue Service, and to demonstrate that the post-*Smith* equal-consideration Free Exercise test, based on *Sherbert*, cannot be limited to unemployment cases.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in her Petition, ROSA C. PACKARD prays that this Court grant her petition for a writ of certiorari, and reverse the judgment below.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
JAMES H. FELDMAN, JR.
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200
Attorneys for Petitioner

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